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IMPACT OF THE SUPREME COURT DECISION *ADARAND V. PEÑA* ON THE FEDERAL CONTRACTING PROCESS

by

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One of the most controversial topics that has been debated in the last two decades is affirmative action. In 1989, Adarand Constructors offered the lowest bid to subcontract guardrails on a Department of Transportation highway contract, but was not awarded the contract. The award instead went to a minority firm so the prime contractor could receive monetary incentives from the Government for subcontracting with minorities. Adarand sued the Government on the basis that the affirmative action policy violated its constitutional rights of equal protection and due process. In 1995, the U.S. Supreme Court reviewed the case and held that the level of scrutiny applied in future applications of affirmative action implementing Federal socioeconomic policy would be raised from intermediate to strict. This thesis studied the need for such programs, the history of socioeconomic policy in Federal contracting, previous Supreme Court cases challenging affirmative action, the changes resulting from the Court's *Adarand* decision on the Federal contracting process, and interview results exploring reaction to the decision in the small business community. The methodology provided could be used for further research and to assist agencies in making decisions about their continued use of affirmative action.

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IMPACT OF THE SUPREME COURT DECISION *ADARAND V. PEÑA* ON THE FEDERAL CONTRACTING PROCESS

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ABSTRACT

One of the most controversial topics that has been debated in the last two decades is affirmative action. In 1989, Adarand Constructors offered the lowest bid to subcontract guardrails on a Department of Transportation highway contract, but was not awarded the contract. The award instead went to a minority firm so the prime contractor could receive monetary incentives from the Government for subcontracting with minorities. Adarand sued the Government on the basis that the affirmative action policy violated its constitutional rights of equal protection and due process. In 1995, the U.S. Supreme Court reviewed the case and held that the level of scrutiny applied in future applications of affirmative action implementing Federal socioeconomic policy would be raised from intermediate to strict. This thesis studied the need for such programs, the history of socioeconomic policy in Federal contracting, previous Supreme Court cases challenging affirmative action, the changes resulting from the Court's *Adarand* decision on the Federal contracting process, and interview results exploring reaction to the decision in the small business community. The methodology provided could be used for further research and to assist agencies in making decisions about their continued use of affirmative action.

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I. INTRODUCTION

A. GENERAL

America has been looked upon by many as a land of opportunity and equality for people from diverse backgrounds, ethnicities, and cultures throughout the world. Many people assert that through hard work and ability, anyone, regardless of their race, sex, or ethical background, can achieve the proverbial "American Dream." The U.S. Constitution, the backbone of American values and fundamentals, states that all men are created equal. The truth of U.S. society is that not every person is treated as having equal rights, i.e., the playing field is not level for all with the desire to participate. The history of the United States documents well that the American Dream is just that to many people—a dream, not a reality.

The Government of the United States, as part of an effort to promote domestic welfare and spur economic development, has established goals to ensure that each citizen has the opportunity to attain economic prosperity. One of the numerous methods that the Government employs to accomplish these goals is to legislate socioeconomic programs to provide benefits to those that were denied the right to compete on an even level. One of the most significant areas that the Federal Government has addressed is racial and gender discrimination when contracting with Federal agencies. The Government has employed affirmative action programs for designated participants in order to remediate past discrimination.

B. BACKGROUND

The lessons learned from World War II established the importance of small businesses within the framework of American economics. Political leaders of the time realized that the future successes and stabilization of the free enterprise system relied heavily on the strength and soundness of the small business entrepreneur. The career politician further realized that the longevity of his political career was positively correlated with catering to the needs and desire of small businesses. Small businesses, generally companies with less than 500 employees, employ 53 percent of the private non-farm workforce and contribute more than 51 percent of the private U.S. productivity (SBA 1997).

The civil rights progress of the 1950s and 60s evolved into the current affirmative action programs. Small disadvantaged businesses (SDBs), comprised of minority and women-owned businesses, were designated to identify entities who were socially or economically deprived of the opportunity to compete with non-SDB firms for Federal procurement dollars. Over time the laws and lawmakers conveniently put labels on various groups that categorized them as disadvantaged socially and/or economically. As individuals within these groups started to progress and succeed, no mechanism was introduced to subsequently measure the progress of these concerns to revise the generalization of such labels. By not doing so, lawmakers created a climate incongruent with the goals they were trying to attain for many of the benefactors of affirmative action

policy, i.e., not all minorities fall within the guidelines of the economic disadvantaged criteria.

Federal contracting set-aside dollars for SDBs became a major tool for the Government to legislate its socioeconomic policy and to right previous wrongs. Those parties who felt they became disadvantaged in the process of carrying out this policy felt this too was wrong.

This conflict came to a head in 1989 when Adarand Construction Company sued the Department of Transportation (DoT) in a case that would eventually be appealed to the Supreme Court. The landmark ruling from the highest court in the land would establish new guidelines to determine the use of race and gender-based preferences in the awarding of Federal contracts. The case and the residual effects of the Supreme Court's ruling provide the basis for this study.

C. OBJECTIVES

This thesis examines whether the advances that the U.S. has made in the areas of socioeconomic development and affirmative action since the 1950s are being eroded. This task is accomplished by analyzing the basis of the Supreme Court's *Adarand Constructors Inc. v. Peña* ruling, exploring the Federal contracting environment in the pre- and post-*Adarand* eras, and interviewing a small sample of current Federal contractors.

D. RESEARCH QUESTIONS

1. Primary Research Question

What is the effect of the Supreme Court's *Adarand* ruling on Federal contracting?

2. Subsidiary Research Questions

a. What are the socioeconomic goals of the Federal Government?

b. What are the methods that the Government can use to attain those goals?

E. SCOPE

The scope of this thesis is to provide an understanding for Federal agencies and other interested parties of the impact of the Supreme Court's decision on the *Adarand* case. The information developed and conclusions drawn in this study are intended to aid contracting officials and policymakers in the continuing future use of socioeconomic policy in post-*Adarand* Federal procurement programs.

F. LIMITATIONS

The major limitation of this study is that at this time the Supreme Court's ruling is less than three years old. The interviews are exploratory and of a small sample and are not necessarily extrapolatable to the Federal contracting population.

G. METHODOLOGY

The methodology for this thesis is an analysis of comprehensive literature combined with phone interviews of organizations and contractors affected by the Court's *Adarand* decision. The literature is from academic sources, professional organizations (National Contract Management Association, American Bar Association, etc.), and

Government agencies (Small Business Administration, Department of Justice, Department of Defense, etc.).

Telephone interviews were conducted with personnel from various organizations, private and public, to reflect the impact of the *Adarand* decision on their operations. The participants were offered anonymity in order to solicit open, frank, and honest opinions.

H. ABBREVIATIONS AND ACRONYMS

Several key terms and acronyms are used throughout this study and are compiled collectively in Appendix A to assist the reader.

I. ORGANIZATION

This thesis is arranged into eight chapters. Chapter I provides a brief introduction and outlines the objectives and research questions of the thesis. It establishes the framework for the thesis including the scope, limitations, and methodology.

Chapter II discusses how the Federal procurement process has used socioeconomic practices in the past to carry out legislative policy. Many of the practices identified in this chapter are referred to throughout the course of the study, and in some cases the growth and subsequent change of these tools will be evaluated.

Chapter III identifies legal cases that have challenged the use of socioeconomic policy at the local, state, and Federal levels. The facts and holdings of these cases are used to analyze the jurisprudence that was established that inevitably influenced the *Adarand* decision.

Chapter IV discusses the political and socioeconomic environment of the country in the years leading up to period that *Adarand* was argued. These events and factors were influential to the Justices reasoning in deciding *Adarand*. An appreciation of what was happening in the country at the time of the decision, provides better understanding of why the *Adarand* case was so critical to future Federal procurement actions, decisions, and policies.

Chapter V provides an in-depth analysis of the *Adarand* case, as well as the opinions of both the majority and dissenting justices. The majority opinion reflects the issues and conditions with which Federal agencies are presently required to comply in all current and future procurements.

Chapter VI presents the President's response to the ruling and analyzes the executive order to Federal agencies to review their programs for *Adarand* compliance. This section further discusses post-*Adarand* initiatives and actions that agencies developed to be in compliance with the Supreme Court's ruling.

The interview results are discussed in Chapter VII. The responses provide a basis for understanding differences in impact of the *Adarand* ruling.

Chapter VIII is a summary of the thesis, answering the primary research question and subsidiary research questions. Conclusions identified in the course of research are provided as well as specific recommendations offered by the researcher identified as areas of further research.

II. HISTORY OF SOCIOECONOMIC POLICY IN FEDERAL CONTRACTING

Lessons learned from World War II indicate that the country benefited significantly because of the efforts and innovation of the small business entrepreneur. In the U.S., a major piece of legislation, the Small Business Act of 1953, requires that a certain number of Federal contracts be reserved for small businesses (15 U.S.C. 637). Small businesses create new jobs in manufacturing at a higher rate than do larger firms (Curran et al., 1986). Small businesses have been viewed as an important part of the industrial base of thriving economies because they diversify industrial power and are regarded by many as more innovative than large businesses.

The Federal Government is the world's largest purchaser of goods and services. The contracting of those goods and services is a multi-billion dollar industry. Social unrest in the 1950s and 60s prompted the Federal Government to initiate several programs aimed at bringing more minorities into the forefront of American economic life (Dobler and Burt 1996). Throughout the Federal Government, numerous programs were created in an attempt to increase procurement and contracting with an even more diverse sub-set of the small business sector—small disadvantaged businesses (SDBs) and women-owned business enterprises (WBEs) (Edley and Stephanopoulos 1995).

The Federal Acquisition Regulation (FAR), the primary regulation used by Federal agencies for the acquisition of goods and services, provides it is the Government's policy "to provide maximum practicable opportunities in its acquisitions to small business

concerns, SDBs, and WBEs" (FAR part 19.201 1997). SDB and WBE programs were initiated in response to specific executive and congressional findings that discrimination on a far-reaching scale had impeded the ability of these small business entities of the same possibility of developing in the American economy (Edley and Stephanopoulos 1995).

Over the course of the past 20 years, dating back to the *Bakke* Supreme Court decision, a case that will be analyzed in depth in Chapter III, affirmative action and how it affects Federal procurement has become a polarizing issue in this country. This chapter will review some of the actions and initiatives that the Government (legislative and executive branches) has enacted to address the enforcement of socioeconomic policy within the procurement process for Federal goods and services.

A. SMALL BUSINESS ACT

The Small Business Act of 1953 authorizes the SDB Utilization program. This Act, subsequently updated, mandates that a fair distribution of Government procurement be placed with small firms. Government contracting purchases handled in this manner are called small-business set-asides. The Act establishes a Government-wide goal for participation by these concerns at five percent or greater of the total value of all prime contract and subcontract awards for each fiscal year and mandates the head of each Federal agency to establish agency-specific goals for participation by these entities (15 U.S.C. 637). The Small Business Administration was created as part of the Small Business Act to manage the implementation of the legislation.

B. SMALL BUSINESS INVESTMENT ACT OF 1958

Congress's intent with the Small Business Investment Act of 1958 was to augment the 1953 legislation to improve and stimulate the national economy in general, and in particular—the small-business segment of the nation. The primary method that Congress employed to accomplish this goal was to establish a program to encourage the flow of private equity capital and long-term loan funds which small-business concerns needed for the sound financing of their business operations and for their growth, expansion, and modernization. One of the goals of the Investment Act of 1958 was "to stimulate and supplement the flow of private equity capital and long-term loan funds which small-business concerns need for the sound financing of their business operations and for their growth, expansion, and modernization" (15 U.S.C. 644). Congress was interested in small businesses becoming more stable by applying an intense investment regime using resources available through Federal loan guarantees.

It was also the intention of Congress to enforce the Small Business Investment Act of 1958 so that it would not result in an increase of unemployment in any area of the country (15 U.S.C. 644). The Act introduced the concept that any goods and services that were purchased through the guaranteed loans must be purchased in the U.S., a precursor to the Buy-American Act.

C. SET-ASIDES

No issue within the realm of procurement socioeconomic policy has created as much furor, emotion, and controversy as the use of minority set-asides. Many non-

minorities who are being denied the opportunity of competing for these contracts feel that the use of set-asides in this fashion is nothing more than Federally-mandated discrimination (Eastland 1997). A more in-depth analysis of set-asides will be addressed later in this section.

The Small Business Act states that there is no documentation within its authority that prevents the use of small business set-asides for procurements of architectural and engineering services, research, development, and test and evaluation. The document adds that each Federal agency is authorized to develop similar set-asides to further the interests of small business in those areas (15 U.S.C. 644).

Furthermore, the Act requires that all small purchases using simplified acquisition procedures must be reserved exclusively for small businesses if there is a reasonable expectation of obtaining price quotations from two or more small businesses that will be competitive in terms of market price, quality, and delivery (15 U.S.C. 644).

Under a small business reserve, a small business may provide products that would normally be procured via a large business. Under conditions where the proposed procurement is not expected to exceed $100,000, the Small Business Act and the Office of Federal Procurement Policy (OFPP) Act require that agencies post either a notice describing the proposed procurement or a copy of the solicitation for a period of not less than ten days in a public place at the contracting office issuing the solicitation.

Should the procurement value of any Government contract fall between $2,500 and $100,000, that contract must be awarded solely to a small business, hence the nature

of the set-aside policy. There are essentially two categories of these preference vehicles that the Government uses to enhance small business participation: The total set-aside and the partial set-aside.

1. Total Set-Asides

Total set-asides are used only when there is a high probability that at least two or more "responsible" small business entities will be vying for the contract, or the procuring agency knows that award will be made at fair market prices (FAR 19.502-2).

2. Partial Set-Asides

When the requirements for the use of a total set-aside have not been attained, the procuring agency can use a portion of the contract to meet socioeconomic goals (FAR 19-502-3(A)).

D. SMALL BUSINESS ADMINISTRATION

The U.S. Small Business Administration (SBA) was created in 1953 as an independent arm of the Federal Government. Congress's intent in creating the SBA was to aid, counsel, assist, and protect the interests of small business concerns while preserving free competitive enterprise, and maintaining the strength of the overall economy. Small business is critical in order to fortify the foundation of a strong economy recovery, build America's future, and help the U.S. compete in today's global marketplace (SBA 1997). The SBA serves as the nation's champions of the small business community for the small businessperson.

The primary responsibility of the SBA is to protect the interests of small businesses. That goal is achieved by providing financial assistance through numerous loan and loan guarantee programs; assisting with Government procurement of small-business products and services; arranging minority business assistance programs; providing small-business counseling; and educating entrepreneurs about international trade, technology, and research.

The SBA does not provide grants to start or expand a business. What it does provide is financial assistance in the form of guaranteed loans, and on some occasions (such as disaster relief) direct loans to small businesses. In Fiscal Year (FY) 95, the SBA guaranteed more than 60,000 loans totaling $9.9 billion to America's small businesses, and provided more than 45,000 direct loans totaling $1.2 billion to disaster victims for residential, and personal property, as well as business losses (SBA 1997). Working side by side with the Federal Emergency Management Agency (FEMA), the SBA's disaster loan program is the Administration's only form of assistance that is not limited to small businesses (SBA 1997).

E. SBA'S 8(A) PROGRAM

Administered by the SBA's Office of Minority Enterprise Development (MED), the 8(a) Program is one of the Federal Government's primary vehicles for developing small businesses that are owned by minorities and other socially and economically disadvantaged individuals. To be eligible for the 8(a) Program, a firm must be a small business that is at least 51-percent owned and controlled by one or more socially and economically

disadvantaged persons(13 C.F.R. 124). The program's name originates from the fact that Section 8(a) of the Small Business Act of 1953 is dedicated to the development of small businesses.

1. Social Disadvantage

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control (FAR 19.001(a)).

2. Economic Disadvantage

For purposes of the 8(a) Program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged. Such diminished opportunities must have precluded or are likely to preclude corresponding individuals from successfully competing in the open market (FAR 19.001(b)).

Firms that enter the program are granted the right to receive contracts that Federal agencies designate as 8(a) contracts without competition from firms outside the program. By extending Government contracting preferences and other business development support, it helps these firms gain access to the economic mainstream (13 C.F.R. 124). In a unique arrangement, the performance of these contracts are administered by agencies of

the Federal Government contracting with the SBA, as the prime contractor, which in turn sub-contracts with the 8(a) firms that execute the actual delivery of supplies and services.

Additional support comes in the form of the following business development assistance:

- Sole source and competitive 8(a) contract support.
- The transfer of technology or surplus property owned by the United States to program participants by grant.
- Training sessions to enhance program participant's skills in the area of business principles.
- Assistance from procuring agencies in forming joint ventures.
- Training and technical assistance in business planning to help ensure the firm's successful transition from the 8(a) program to the competitive market.

(SBA 1997)

Subsequent changes to the program in response to the Supreme Court's ruling, in addition to problems identified prior to *Adarand*, are detailed in Chapter VI.

F. DOD INITIATIVES

The Department of Defense (DoD), one of the Government's major contractors, provides lucrative opportunities for small businesses. DoD executes approximately two-thirds of the total amount of all Federal prime contracts (Edley and Stephanopoulos 1995). DoD procurement is a major implementation tool that allows the Government the opportunity to conduct socioeconomic policy.

Section 1207(a) of Public law 99-661 established an objective of five percent of total DoD obligations for contracts and subcontracts awarded to small disadvantaged business concerns. In order to implement this statute, the Secretary of Defense requires each Service to conduct extensive outreach efforts to locate SDB firms and make them aware of the opportunities available under existing legislation and regulation. In addition to participating in the goal-setting and 8(a) efforts, DoD has two additional efforts—"Rule of Two" set-asides and the 1207 program. The use of these programs was significant. Prior to the *Adarand* ruling, 60 percent of DoD's contracting efforts with SDBs and WBEs used one of these two programs (Edley and Stephanopoulos 1995).

1. Rule of Two

Under the Rule of Two (set-aside program), DoD contracting officers were authorized to limit bidding on particular contracts to only SDBs or WBEs (primarily minority firms) if two or more such firms were potential bidders and the officer determined that the prevailing bid would likely be within ten percent of the fair market price (OASD 1995). The program was directly affected by the *Adarand* ruling, details of which will be provided in Chapter VI.

2. 1207 Program

DoD's 1207 Program mandates occur whenever there is the opportunity for full and open competition and procurement depended upon price factors alone. In these

instances contracting officers are authorized to add ten percent to the price of non-SDB bidders and then award the contract on the basis of the revised bids (P.L. 99-661).

G. CHAPTER SUMMARY

The history of socioeconomic policy in Federal contracting delineated in this chapter reflects the Government's attempt to correct past inequities. Federal agencies' efforts to implement these programs and subsequent challenges to them have put each of these initiatives to the judicial test. These initiatives have been challenged on the grounds of fairness and constitutionality in courts at the local, state, and Federal levels. Chapter III will review proceedings that preceded the *Adarand* case in determining the legality establishing socioeconomic policy in Federal contracting.

III. LEGAL CASES AFFECTING SOCIOECONOMIC POLICY PRIOR TO *ADARAND*

> We cannot fall prey to the destructive tactic of "divide and conquer" for the sake of political expediency. Affirmative action has not only benefited those who have been historically locked out; it has benefited our nation as a whole...Race- and gender-inclusive policies turn tax consumers into tax producers. A diversified corporate America is better able to compete in this increasingly globalized economy. Let us not be misled: Increasing the educational and employment opportunities for a majority of Americans is good for the nation and good for our future.
> Jesse L. Jackson, Civil Rights Activist
>
> Americans need policies that promise more progress than affirmative action has delivered. Affirmative action helps a few, but its overall effect is to hurt the groups it is designed to aid. It helps some in the short run through unjustly hurting others. That inherent unjustness, in turn, aggravates already tense race relationships. Worst of all, affirmative action subverts the only really functional and morally acceptable criterion for judging anything or anyone: merit.
> Armstrong Williams, Affirmative Action Opponent
> **"Affirmative Action—Two Views," *The World and I*, November 1995.**

Affirmative action is the key issue that lies at the core of the *Adarand* case. This decision will direct how the Federal Government applies affirmative action in implementing socioeconomic policy in contracts. Affirmative action, originally designed by President John F. Kennedy, was intended to help people who were once oppressed receive in school and in the work place, the fair treatment that they deserved (Gribbons 1996). Today, affirmative action has the potential to polarize the nation pitting, proponents against opponents in tense racial and gender competitive scenarios.

Socioeconomic policy is the Government's attempt to amend these inequalities against minorities and women, and level the playing field. This policy was in response to specific executive and congressional data supporting the position that widespread discrimination has been the obstacle to SDBs' and WBEs' ability to have an equal chance at developing in the U.S. economy (Edley and Stephanopoulos 1995). Evidence provided by the Department of Justice's (DoJ) findings indicates that racially, as well as gender oriented, discriminatory barriers hamper the ability of SDBs and WBEs to compete on an equal footing in our nation's markets. These barriers consist of discrimination by trade unions, lenders, and most notable in the DoJ study prime contractors in Federal contracts (DoJ 1995). Unfortunately, in the Government's efforts to bring about a sense of fairness, it infringed upon the rights of another group during this process, specifically, white males.

The use of affirmative action programs and socioeconomic policy created a modern day role reversal of what many civil rights groups marched, fought, and died for in the 50s and 60s. The legal practice of equal protection has slowly developed into the healing principle that the use of racial classifications is sometimes permissible as long as race-conscious laws, passed by the majority, relieve the effects of past discrimination against a racial minority (Tribe 1989).

The attempted development of compassionate racial and gender classification analysis can be traced through the succession of cases that begins with *Regents of the University of California v. Bakke* (hereafter referred to as *Bakke*) (438 U.S. 265 1978),

followed by *Fullilove v. Klutznick* (*Fullilove*) (448 U.S. 448 1980), *City of Richmond v. J.A. Croson Co.* (*Croson*) (488 U.S. 469 1989), and *Metro Broadcasting, Inc. v. Federal Communications Commission (FCC)* (*Metro*) (497 U.S. 547 1990). This chapter will provide a detailed analysis of these cases that preceded *Adarand*, and examine how affirmative action at the local, state, and Federal levels applies in terms of the U.S. constitution. This analysis will demonstrate how these cases helped to develop the jurisprudence that would eventually be applied to *Adarand*.

A. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*

Bakke's significance comes from being the first major case that tested the constitutionality of affirmative action before the Supreme Court. In the eyes of the Court, the *Bakke* case picked up where *Brown v. the Board of Education* (344 U.S. 1 1952) left off. Integrated schooling fulfilled the Supreme Court's description of education in *Brown* as "a principal instrument in awakening the [student] to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment" (Katyal 1995). In one regard the University of California at Davis' (UCD) "special minority admissions" program fulfilled the vision of Brown by diversifying the medical program, but created the legal question: Did it come at the expense of others' constitutional rights?

Allan Bakke, a white engineer, applied twice to the medical school at UCD. Each time he was denied, although some minority applicants with lower test scores and grades than Bakke were admitted. Bakke sued, claiming reverse discrimination and a violation of

his rights under the Fourteenth Amendment, equal protection under the law (U.S. Constitution). The relative portion of the Fourteenth Amendment that is considered in cases of preferential policy based on race and gender is as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.
> (U.S. Constitution)

The primary issue under review in the *Bakke* case was the legality of UCD's special minority admissions program as it applied to the Fourteenth Amendment. Lawyers for Bakke argued that the program was nothing more than a quota program. This claim was made on the basis that applicants under the special program were rated only against each other, and that there were 16 slots (out of the 100 available annually) reserved for minorities (*Bakke*, p. 266). Counsel for the California Regents countered that the special admissions programs was indeed lawful. By admitting more minorities the medical school would improve medical services to underserved communities. This theory makes the assumption that minorities would be more likely to work in underserved communities than would non-minorities. The fact that the non-minority admittants would not practice in the inner cities and the minority admittants would was very shaky grounds for defense of the program at best, but in their own rationale the Regents felt that the need for the program was justifiable.

While the legitimacy of using race-conscious remedies under some circumstances was upheld in *Bakke*, the many separate opinions issued by the justices in the case read

like a debate on the underlying issues. The Supreme Court announced a divided ruling on the *Bakke* case. Five of the nine justices agreed that the rights of the rejected applicant were violated by the UCD plan. But the Court split with no majority on nearly every specific legal issue at stake. A plurality of four justices, William J. Brennan, Byron R. White, Thurgood Marshall, and Harry A. Blackmun, maintained that an affirmative action program could lawfully take into account race for the "benign" purposes involved (*Bakke*, p. 361). Such uses of race, they argued, should be judged by an intermediate level of court scrutiny, such that they need not be necessary for achieving an important Governmental interest. The use of an intermediate level of scrutiny that the Court applied to *Bakke* contrasts the "strict" scrutiny that the *Adarand* Court used and dictates the degree of application to the ruling, as I analyze the *Adarand* case.

Only one Justice, Lewis F. Powell, argued to apply to affirmative action the standard of strict scrutiny, which was employed in assessing "invidious" for the purpose of excluding discrimination (*Bakke*, p. 290). He argued for the training of future leaders in a setting that exposes them "to the ideas and mores of students as diverse as this Nation of many peoples"(*Bakke*, p. 313). Justice Powell's vote, viewed by many as the deciding vote in the *Bakke* case, upheld the use of race and ethnicity as an acceptable criterion in admission, and his opinion has since been a standard for legal scrutiny of college and university admission practices. Justice Powell's opinion stated that the achievement of "a diverse student body...clearly is a constitutionally permissible goal for an institution of higher education" (Gladieux 1996).

B. *FULLILOVE V. KLUTZNICK*

Congress enacted the Public Works Employment Act of 1977 in May of that same year. The "minority business enterprise" (MBE) provision of the Act required, that in the absence of an administrative waiver, at least 10 percent of Federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members (P.L. 95-28 1977). The program was administered by the Department of Commerce, whose secretary was Philip M. Klutznick.

The petitioner, Fullilove, led a group of contracting associations, made up of prime and subcontractors from non-minority groups, alleged that they had sustained economic injury due to enforcement of the MBE requirement. They also argued that the MBE provision, on its face, violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. Due Process is the concept that laws and legal proceedings must be fair. Throughout the history of the U.S., its constitutions, statutes and case law have provided standards for fair treatment of citizens by Federal, state, and local governments. These standards are commonly referred as due process. The Constitution guarantees that the government cannot take away a person's basic rights to "life, liberty or property, without due process of law" (U.S. Constitution).

The Supreme Court held that the MBE program was not unconstitutional. The Court asserted that the congressional objective was to ensure that those contractors

receiving Federal funds would not use practices that would allow the effects of past discrimination in public contracting to continue (*Fullilove*, p. 488). The Court agreed that Congress had the power to enact such legislation in regards to the Commerce Clause, because the Act imposed economic regulations on private contractors receiving public funds. The Court further held that Congress could also impose such requirements on state governments pertaining to its enforcement powers contained in Section Five of the Fourteenth Amendment (*Fullilove*, p. 508). In layman's terms, the legislation imposed by the Public Works Employment Act was meant to dismantle the good-old-boy network. Indeed, the Court understood that Congress had authority to employ racial criterion in order to accomplish socioeconomic objectives, particularly in situations where Federal funds are involved.

Overall, the *Fullilove* Court acknowledged congressional authority to implement the legislative intent of the Fourteenth Amendment and other equal protection laws through the use of proactive programs.

C. *CITY OF RICHMOND V. J.A. CROSON CO.*

Prior to what *Adarand* accomplished at the Federal level, *Croson* paralleled at the state and local levels. The city of Richmond, Virginia, adopted a Minority Business Utilization Plan requiring prime contractors awarded city construction contracts to subcontract at least 30 percent of the dollar amount of each contract to one or more MBEs. The plan defined MBEs to include a business from anywhere in the country, that was at least 51 percent owned and controlled by minorities. Declared to be remedial in

nature, the plan was enacted for the purpose of promoting wider participation by MBEs in the construction of public projects. Proponents of the plan stated that although the city's population was 50 percent African American, they received only 0.67 percent of the prime contracts and virtually no local contracting associations had any MBE representation (*Croson*, pp. 479-480). The city's legal counsel believed that the terms of the plan would be justified constitutional in light of the *Fullilove* ruling. Prior to implementing the plan the city attached a waiver clause to the plan, that could be used in the event that offerors could provide sufficient proof that no qualified MBE was available or was not willing to participate.

J. A. Croson Company, a mechanical plumbing and heating contractor, bid on a project to install stainless steel urinals and water closets in the Richmond city jail. Unable to secure a qualified MBE prior to the submittal date of the bids, Croson submitted a bid without MBE consideration, and concurrently applied for waiver of the MBE requirement. Opening of the bids revealed that Croson was the sole bidder that had applied for the contract, but the city dealt the company two damaging blows: (1) the waiver was denied because city officials received information that Continental Metal Hose, a MBE contractor, had attempted to align with Croson; and (2) the city decided to re-bid the contract. Croson sued the city on the grounds that the plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause (*Croson*, p. 483).

The Court declared the plan to be in violation of the Equal Protection Clause. Writing the majority opinion for the Court, Justice Sandra Day O'Connor held:

> [T]o accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for "remedial relief" for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs...We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality. (*Croson*, pp. 505-506)

One of the major faults of the plan was in its description of participants, Aleuts were included. This over-applying represents a perfect opportunity to test the theory of the narrow tailoring principal. The Court felt that the Richmond preferences were not narrowly tailored to remedy past discrimination, because some of the beneficiaries were not the victims of past discrimination, i.e., there was no evidence presented that reflected Aleuts living in Richmond, Virginia were ever discriminated against.

The *Croson* opinion uses narrow tailoring as a principal consideration in favor of "the use of race-neutral means to increase minority participation." Yale Law School Professor Ian Ayers comments on the use of "race neutral" means as a method to accomplish legislative socioeconomic policy to remedy past discrimination and ponders the possibility of this being the best possible alternative available:

> The [Court's] preference for "race-neutral" means to increase minority participation clearly contemplates legislative action "because of" its effects on minority entrepreneurs. And while it is difficult to clearly specify the minimum necessary requirement for establishing what constitutes a "predominant" motivating factor, it should not be difficult to conclude that subsidies fashioned to increase minority participation had race as a predominant motivating factor. If we intend to subject racially motivated legislation to strict scrutiny, at the end of the day we must still answer which racially motivated means is the least restrictive alternative. (Ayers 1996)

A major counter strategy that has been used to contest the latter hurdle has been the proliferation of disparity studies. Justice O'Connor also made it clear that the disparity between the number of contracts awarded to minority firms and the minority population is not the appropriate test. Instead, the appropriate test would have been to determine if there were a significant statistical disparity in the number of qualified minority and non-minority firms willing and able to perform a particular type of work, and the number of those firms employed by the Government entity and its prime contractors. The requirement to conform to the appropriate application of disparity data has been viewed by many as the dawn of a disparity industry in the post-*Croson* era. The use of disparity studies will be analyzed more thoroughly in Chapter VI.

Indeed, it is abundantly clear that there is simply no equitable method to resolve such competing racial and ethnic class claims in a manner consistent with the rule of law. Justice Anthony M. Kennedy accurately expressed the original intent of the Fourteenth Amendment when he remarked in his concurring opinion that "the moral imperative of racial neutrality is the driving force of the Equal Protection Clause" (*Croson*, p. 518). *Richmond v. Croson* has been seen by proponents of affirmative action as probably a very damaging blow to city set-asides, when the Court's edict of strict scrutiny must be applied, and the additional requirement of sufficiently documenting previous discrimination against the benefiting group.

D. *METRO BROADCASTING, INC. V. FCC*

The issue in this case was to determine whether certain minority preference policies of the FCC violated the equal protection component of the Fifth Amendment. The specific policy in question was an FCC program that awarded an enhancement for minority ownership in comparative proceedings for new licenses against that of non-minority applicants. *Metro*, reviewed only a year after *Croson*, differed from the *Croson* decision in that *Croson* applied only to state and local governments and *Metro* affected Federal application. Many, keeping track of both cases, felt that the pending decision of *Metro* would be the same as held in *Croson*. In an unexpected reversal from previous legal precedent, the Court's lenient standard of review for preferences in the *Metro* decision conflicted with the prior affirmative action rulings that were held in *Bakke*, *Fullilove*, and most notably *Croson*.

Metro Broadcasting, Inc., was denied a television license, which was subsequently granted to Rainbow Broadcasting. Although less qualified to operate such a venture, Rainbow Broadcasting was given an advantage in the selection process because it was cited to have more than 51 percent minority ownership. Metro filed suit with the FCC to review the application without the consideration that Rainbow was a minority owned firm. Prior to completion of the FCC's inquiry of Metro's review, Congress enacted the FCC appropriations legislation for fiscal year 1988. In that appropriations act, Congress specifically prohibited the FCC from spending any appropriated funds to examine or change its minority policies. The FCC policy was to award an enhancement to a minority

applicant which, weighed with other factors, enabled licenses to be granted for the operation of new radio and television stations. In light of the legislative action, the FCC review did not change the granting of Rainbow's license.

The FCC policies were adopted to comply with the Communications Act of 1934 in an effort to promote diversity in programming. The Act states that in the interest of the public good, there should be diverse programming encouraged over the airwaves (CRL 1998). Since there was evidence to support the notion that diverse programming had not happened on its own accord, the FCC and Congress adopted policies to encourage minority participation further. The two Governmental bodies found that the most efficient way to achieve the goal of diversity was to promote minority ownership (*Metro*, pp. 554-558).

Metro filed suit claiming discrimination because the firm was of non-minority ownership and that the FCC was in violation of the Fifth Amendment's equal protection component of the Due Process Clause. Justice Brennan delivered the majority opinion of the Court, in which Justices White, Marshall, Blackmun, and John P. Stevens joined. Justice O'Connor filed a dissenting opinion, in which Chief Justice William Rehnquist, and Associate Justices Antonin Scalia, and Kennedy joined. The Court found that the FCC's granting of the license to Rainbow did not violate Metro's rights under the Fifth Amendment. Justice Brennan indicated that the Court would allow extraordinary deference to the Congress: "It is of overriding significance in these cases that the FCC's

minority ownership programs have been specifically approved, indeed mandated, by Congress" (*Metro*, p. 563).

The Court determined that diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation's radio and television airwaves. This opinion was reached under the use of intermediate scrutiny, however, and in doing so did not hold that the Governmental interest in seeking diversity in broadcasting is "compelling" (Dellinger 1995).

The uncommon logic of the decision in *Metro* is quite impressive. Racial classifications will no longer automatically trigger the strictest judicial examination if they are supposed to benefit members of preferred racial and ethnic groups. Even more significant is the fact that there is not the necessity of justifying the classifications in terms of providing remedies for victims of discrimination; nor was there any necessity of demonstrating that preferential policies to encourage minority ownership would in fact lead to programming diversity. The importance of the holding of the *Metro* decision was short lived as the *Adarand* case was already proceeding through the judicial process, and on its way to becoming the new "king of the hill" affirmative action Supreme Court ruling.

E. CHAPTER SUMMARY

The precedential sequence of the Supreme Court decisions held in *Bakke*, *Fullilove*, *Croson*, and *Metro* identify how volatile the terrain is that is the minefield of the Constitution versus affirmative action landscape. Taken individually each case is

momentous in its own right: *Bakke* ruled that race may be one factor in a university's admission policy, yet it is unconstitutional to be the only factor; *Fullilove* rejected a challenge by contractors to a Federal requirement that ten percent of the work on Federal projects must go to minority firms; *Croson* disallowed the Richmond's set-aside plan requiring that 30 percent of subcontracts go to minority-owned firms; and after *Metro*, the FCC's use of program awarding preferences for minority broadcast licensing were upheld because they did not violate equal protection principles.

At the end of the 1989-90 Supreme Court term when the *Metro* decision was announced, the composition of the liberal to conservative ratio was on the verge of shifting. Many of the Justices that were considered the more liberal, affirmative action proponents, were among the oldest on the bench:

> [L]ooking back now, the ruling in [*Metro*] may well have been the last stand of the Supreme Court's liberal wing. Only three weeks after [Justice] Brennan delivered the opinion, he suffered a slight stroke and was forced to retire. In 1991, Marshall retired...Two other of the *Metro* majority—Justices White and Blackmun have stepped down as well. Stevens remains as the only signer of the Court's last opinion upholding Government affirmative action, and his support was clearly tentative. But the four dissenters in *Metro* are still around. And they apparently have gained at least one ally among the newer Justices. Clarence Thomas, who replaced Marshall, often has stated his belief in a "color blind" Constitution. (Savage 1995)

The preceding passage speaks volumes in terms of how subsequent cases regarding affirmative action will be reviewed and what the resultant outcome will be. The issue of the political composition of the Supreme Court will be analyzed more closely in

Chapter IV. As the future of affirmative action hangs in the balance, the pendulum of jurisprudence is all too ready to make another pass with the *Adarand* case looming on the horizon.

IV. SOCIOECONOMIC ENVIRONMENT OF THE NATION PRIOR TO *ADARAND*

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair.
> President Lyndon Johnson's Commencement Address at Howard University: "To Fulfill These Rights," 4 June 1965

President Johnson's words came on the heels of passage of the 1964 Civil Rights Act, and during a time of tremendous strain on race relations in this country. The period of time between 1960 and 1990 saw a tremendous amount of advancement for minorities in America, especially for African-Americans (Dennis 1995). Unfortunately dividing up market share is a zero sum gain. The affirmative action debate that had been going on in America in the period leading up to the *Adarand* decision was a product of highly-charged issues that had been building during these years. The debate, as defined in the court challenges noted in Chapter III, had also become charged in other aspects of social interaction. The fact is Race and gender relations are emotionally charged conductors that affect social intervention. Controversy around equal opportunity intensified in the early to mid-90s during the time that the *Adarand* case was placed in the national spotlight.

The initial intent of affirmative action was originally considered to be any legislative and/or judicial action aimed at eliminating discrimination (*The Legal Rights of Women* 1998). For obvious reasons the history of race black/white relations in this country has not been one of our most impressive chapters. Other race/ethnicities also

have long had legitimate complaints that have only lately come to be addressed, e.g., Native Americans and Hispanics. Many non-minorities have felt they were being asked unfairly to bear the burden for old wrongs, many of which were conducted centuries ago, in which they played no part at all. Dr. Stanley Fish of Duke University, countered that use of the latter argument sometimes becomes a double-edged sword:

> [I]f today's white males do not deserve the (statistically negligible) disadvantages they suffer, neither do they deserve to be the beneficiaries of the sufferings inflicted for generations on others; they didn't earn the privileges that they now enjoy by birth and any unfairness they experience is less than the unfairness that smoothes their life path irrespective of their merit.
> (Fish 1995)

What Dr. Fish is saying is in order for non-minorities (white males) to enjoy the benefits of our ugly past, they must accept the reason it came about.

Events such as the Los Angeles Riots following the Rodney King police beating acquittals, the Louis Farrakhan led Million Man March, and the O.J. Simpson acquittal only helped to further entrench the issue of race relations. By the mid-90s, with the assistance of the news media, the polarization of America by race was in the forefront of all our minds.

Lying directly at the heart of the *Adarand* case is the topic of affirmative action and the reverse discrimination, or rather the "reverse racism" (Fish 1995) that it creates. The *Adarand* case was a product of the socioeconomic environment that was taking shape in America at the time—an environment that had to have had an impact on Justices'

decision. The intent of this chapter is to identify four significant contributors that played crucial roles in the arguments and eventual outcome of the case: a shift in the composition of the Supreme Court; the Glass Ceiling Commission; the California Civil Rights Initiative; and the Dole-Canady Equal Opportunity Act of 1995. Analysis of these issues in conjunction with the judicial opinions provided in Chapter III will provide a thorough background to segue into the details of the *Adarand* case.

A. POLITICAL COMPOSITION OF THE SUPREME COURT

A conservative is considered one who supports the status quo on race issues (Kairys 1998). All too often it is the status quo that minorities are trying to move away from. Conservatism was defined most often in terms of opposition to Federal legislation such as the Civil Rights Act of 1964 (DoT 1998), which allowed for the first time in the history of the U.S. equal access to public accommodations and equal voting rights for minorities. Ronald Reagan and Barry Goldwater, for example, opposed such acts and are historically labeled as classic conservatives (Kairys 1998). Whereas liberals "believe it is the duty of government to ameliorate social conditions and create a more equitable society" (*Fast-Times* 1998). As the quote at the beginning of this chapter attests, President Johnson in his later political years was a liberal, and to a larger extent democrats in general are collectively considered to be liberals.

As previously mentioned in Chapter III, the Supreme Court's decision-making patterns are determined by the Court's membership at any given moment in history. For example, in the Earl Warren, William Burger, and William Rehnquist Chief Justice eras,

the Supreme Court made different kinds of decisions and established a different reputation for liberalism or conservatism. The Warren Court (1953-1969) has been regarded as producing "[w]hat can only be described as a constitutional revolution, generated by a group of justices who were perhaps the most liberal in American history" (Walker and Epstein 1993). The decisions of the Supreme Court beginning in the mid-50s did bring about significant changes in American life, most notably the end of official racial segregation in schools and elsewhere.

"By contrast, members of the Burger Court [1969-1986] selected cases in order to cut back, if not reverse, the [liberal] direction of Warren Court policy-making" (O'Brien 1993). As a further contrast, "[t]he transformed [Rehnquist] Court no longer sees itself as the special protector of individual liberties and civil rights for minorities" (Savage 1992). Because each Justice's voting behavior is shaped by his or her attitudes and values, the case outcomes and judicial policies produced by the Supreme Court are a product of the mix of attitudes and values represented among the Justices at the moment a particular issue is presented to the Court (Segal and Spaeth 1993).

When the mix of Justices changes, so too can the constitutional rules that shape policy issues. Presidents and senators behave strategically in nominating and confirming (or not confirming) Supreme Court nominees based on predictions about a particular newcomer's likely impact on important issues (Abraham 1992). Presidents, in particular, seek to shape constitutional law and judicial policy making by selecting new appointees whose votes and persuasiveness on the Court are expected to move decision making in

directions that are consistent with the chief executive's values and policy preferences. During his eight years as President, Reagan made certain the Supreme Court was in conservative hands. While President Richard Nixon appointed William Rehnquist to the Court, President Reagan elevated him to the position of Chief Justice (Marquand 1997). President Reagan also appointed Antonin Scalia, Sandra Day O'Connor, and Anthony Kennedy. Later President George Bush appointed David Souter and Clarence Thomas.

New appointees to the Supreme Court have their greatest impact when their votes determine the outcomes of cases. For example, the replacement of retiring liberal Justice Thurgood Marshall by new conservative Justice Thomas made a dramatic change in the decision-making by the occupant of that particular seat on the Court. In the years immediately preceding his retirement, Marshall had been the Court's most liberal justice on constitutional rights issues by supporting individuals in their battles with the government in nearly 90 percent of cases (Smith and Hensley 1993). By contrast, Thomas immediately became a consistent member of the Court's most conservative voting block in his initial terms on the Court. Despite the differences in their judicial values as reflected in their voting behavior and support for individuals' rights, Thomas's presence on the Court in lieu of Marshall did not lead to an increase in conservative outcomes in civil rights and liberties cases because the Court already had a conservative majority when he arrived. Justice Thomas' arrival could not have the same impact as the previous newcomer, Justice Souter, who replaced liberal Justice William Brennan when the Court was more evenly divided.

B. THE GLASS CEILING COMMISSION

"Glass Ceiling" refers to invisible, artificial barriers that prevent qualified individuals from advancing within their organization and reaching full potential (Glass Ceiling Commission March 1995). The term originally described the point beyond which women managers and executives, particularly white women, were not promoted. In today's business and economic environment it is evident that ceilings and walls exist throughout most workplaces for minorities and women. Preliminary studies found that these barriers result from institutional and psychological practices, and subsequently limit the advancement and mobility opportunities of men and women of diverse racial and ethnic backgrounds (Glass Ceiling Commission March 1995).

The Glass Ceiling Commission was a 21-member body appointed by President William Clinton and Congressional leaders to study the effects of discrimination within the workforce. The Commission was chaired by the Secretary of Labor, Robert B. Reich. Created as part of the Civil Rights Act of 1991, the Commission identified glass ceiling barriers and expanded practices and policies which promote employment opportunities for the advancement of minorities and women into positions of responsibility in the private sector. The Commission completed its mandate in January 1996 and no longer exists.

The Glass Ceiling Commission was tasked to understand barriers that prevented qualified minorities and women from reaching positions of authority in America (Redwood 1996). The reports that were generated identified those barriers and offer real solutions

and guidelines on how those barriers can be conquered in an effort to help our society reach its maximum potential.

During its study the Commission identified three levels of barriers that prevent the advancement of qualified minorities and women:

- Societal barriers, which include a supply barrier related to educational opportunities and the level of job attainment.
- There is also a "difference" barrier manifested through conscious and unconscious stereotyping and bias. It translates into a syndrome that people who do the hiring feel most comfortable "hiring people who look like them." Stereotypes must be confronted with hard data because, if left unrefuted, they become factual in the popular mind and reinforce glass ceiling barriers.
- Governmental barriers include the collection and disaggregation of employment related data which make it difficult to ascertain the status of various groups at the managerial level. Also, there continues to be inadequate reporting and dissemination of information relevant to glass ceiling issues. Most important, there needs to be vigorous and consistent monitoring and enforcement of laws and policies already on the books.

(Glass Ceiling Commission March 1995 pp. 27-29)

The Commission examined the educational and developmental preparedness of minorities and women to advance to management and decision-making positions and performed a comparative analysis of the economic sectors, industries, and businesses with regard to opportunities for minorities and women to upward mobility. The economic consequences of glass ceiling and workforce diversity initiatives were explored, and the use of enforcement techniques in eliminating glass ceiling barriers were examined. The

study looked at the impact of restructuring and downsizing on advancement opportunities and analyzed programs and practices that fostered the progress of minorities and women.

On its last day the Glass Ceiling Commission issued its recommendations report titled, "A Solid Investment: Making Full Use of the Nation's Human Capital." This report, presented to President Clinton and select committees of the Congress, was designed to pick up the pace of change. The recommendations are based upon strategies that companies and Government are already using to end discrimination and were suggested as a beginning, not an end. The recommendations address ways in which business, Government, and society at large can act to bring down the glass ceiling. The Commission cited recommendations for business that included the following:

- The CEO must communicate viable and continuing commitment to workforce diversity.
- Efforts to achieve workforce diversity should be an integral part of corporate strategic business plans and line managers must be held accountable for progress toward breaking the glass ceiling.
- Organizations must expand their traditional executive recruitment networks and seek out candidates with non-customary backgrounds and experiences.
- Formal mentoring and career development programs can help stop minorities and women from being channeled into staff positions that provide little access that leads to the executive suite.
- Business must train the entire workforce in the strengths of ethnic, racial, and gender diversity which can help develop a merit-based working environment.

(Glass Ceiling Commission November 1995 pp. 13-14)

The Commission also suggested that Corporate America should use affirmative action as a tool to help ensure that all qualified individuals have equal access and opportunity to compete based on ability and merit. Affirmative action, properly implemented, does not mean imposing quotas, allowing preferential treatment or employing and promoting unqualified people. It does mean opening the system and providing greater opportunities to recruit, train, and promote prospective situations of advancement for people who can contribute effectively to a corporation and, consequently, to the nation's economic stability.

The Commission stressed that corporate leaders must recognize that they need the talent and input of women and minority men at the highest levels to address the changing consumer markets better, the diversifying work force demographics, and international competition in today's global economy. Data from the Bureau of Labor and Statistics (BLS) projects that by the year 2005, women and minorities are estimated to be 56 percent of the U.S. workforce (BLS 1994).

In addition to the guidance the Commission offered to Business, it also provided recommendations for Government which included:

- Government must lead by example and make equal access and opportunity a reality for all, including minorities and women.
- Enforcement agencies must increase their efforts to enforce existing anti-discrimination laws, strengthen interagency coordination, and update regulations and policies to keep up with the changing workplace environment and current legal opinion and laws.

- Improved data collection can give a clearer picture of the progress of women and minorities and pinpoint areas where improvement is needed.

- Increase disclosure of diversity data as an incentive to develop and maintain innovative, effective programs to break glass ceiling barriers.

- And ensure adequate resources – in funding and personnel – which are essential for enforcement agencies to fulfill their mandates.

(Glass Ceiling Commission November 1995 p. 15)

These recommendations view Government as a partner in the initiative to provide change. Without the implementation of Government policy, many of the initiatives offered would wither on the vine in the grander scheme of the push for the bottom line.

C. CALIFORNIA CIVIL RIGHTS INITIATIVE-PROPOSITION 209

One of the most controversial legal issues of the 90s is the California Civil Rights Initiative (CCRI) also known as Proposition 209. CCRI, endorsed by Governor Pete Wilson, set out to abolish affirmative action in the State of California. The initiative would stop state and local government and public schools from "granting preferential treatment to any individual or group on the basis of race, sex, [or] color" (CA Secretary of State 1995) in the areas of public employment, contracting, and education.

In public employment CCRI would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions (CA Secretary of State 1995). CCRI eliminates any programs that give preferences to women-owned or minority-owned companies on public contracts. The

measure could eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts (and community colleges), i.e., districts would lose funding for admissions programs where race is a primary requirement for entrance.

CCRI was created by co-authors Glynn Custred and Thomas Wood. Custred's and Wood's impetus focused on the existing practices that are used where new offenses are committed in the effort to remedy the old, i.e., should there be scholarships reserved specifically for blacks, should college departments be offered rewards for hiring minorities via their faculty recruiting, or should there be legislative requirements of racial proportionality, not only in university admissions, but also in graduation rates (Schrag 1994)?

Initially, as part of the platform for Governor Wilson's ineffective bid for the 1996 Presidential race, CCRI was met with a groundswell of support. But that initial momentum soon diminished, and a subset of that lack of support—financing—almost created a premature death of the initiative. CCRI came close to not even obtaining the necessary number of signatures required to put the initiative on the California ballot for election year 1996. That was until University of California Regent Ward Connerly was persuaded by Custred and Wood to come onboard as chairman.

Connerly, an African-American businessman, was felt by many to be the force that legitimized the initiative in the eyes of proponents that were straddling the fence. According to Wood, "without Ward and Pete Wilson, CCRI wouldn't have made it on the ballot" (Lowry 1996). Connerly sums up the logic (or illogic) of affirmative action in one

parable, "[w]e're giving a preference to Jose, because he's Chicano, over Chang, because he's Chinese because of something Robert's father, who was white, did to William's father, who was black, 100 years ago" (Jasper 1996).

Throughout his efforts on the campaign for the passage of CCRI, Connerly encountered a great deal of heated opposition arising from Jesse Jackson and other African-Americans who accused him of attempting to undermine the efforts of the late Dr. King and the entire Civil Rights Movement of the 1960s. Connerly has been labeled a "disgrace" and a "sellout" to his own race by opponents of the controversial proposition (Kirk 1997). Many political experts look upon these tactics as nothing more than mud-slinging or race-baiting.

As the battle lines were drawn for the CCRI fight, one of the key issues that opponents of the initiatives were quick to point out was that the key beneficiaries of affirmative action were not minorities, but were white females. At the time CCRI was initiated, African Americans held only 4.5 percent of executive and managerial positions, while white females held 35.9 percent of those positions (Stevens 1995). The issue that pulled Women Rights Groups into the fray was the controversial (and somewhat vague, pending interpretation) "Clause C" of the initiative, which reads:

> Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.
> (CA Secretary of State 1995)

Opponents of the initiative contend that the clause would allow any government agency to declare women ineligible for certain jobs or programs. Connerly sternly rebuked the opposition's tactics as nothing more than a political ploy, "This is a red herring. The only way they think the CCRI can be defeated is if they drive women from men and incite the fears of women" (Decker 1995). Political ploy or not, the debate over "Clause C" of the initiative incited enough attention and interest that it brought the National Organization of Women (NOW) and the League of Women Voters, California (LWVC) into the fold of CCRI opponents (Rockwell 1995).

By a vote of 54 percent to 45 percent, CCRI was approved by California voters in the general election held 5 November 1996 (Lesher 1997). After a series of court challenges including a refusal by the Supreme Court to hear the case, CCRI was enacted into law on 27 August 1997 (CADAP 1998).

D. EQUAL OPPORTUNITY ACT OF 1995

Two of the most prominent members of the GOP who had previously endorsed CCRI were Speaker of the House Newt Gingrich of Georgia, and Senate Majority Leader Robert Dole of Kansas. In February 1995, the Congressional Research Service (CRS) responded to a request from Senate Dole (R-KS) for a comprehensive list of all bills that offered special preferences for minorities (Lacayo 1995). The inquiry was further required to contain, "every [F]ederal statute, regulation, program, and executive order that grants a preference to individuals on the basis of race, sex, national origin, or ethnic background" (Franc 1996). In Senator Dole's terminology, preferences "include, but [were] not limited

to, timetables, goals, set-asides, and quotas" (Franc 1996). The CRS study listed more than 160 Federal laws, regulations, and executive orders that contained these preferences, identifying race and sex-based preferences that range from 5 to 25 percent. These preferences came in all shapes and sizes, with specific programs mandating preferences at such widely variable levels as 5 percent, 6.9 percent, 8 percent, 10 percent, 12 percent, 15 percent, and 25 percent (CRS 1995).

In response to this review and on the heels of his endorsement of CCRI, Senator Dole along with Florida Representative Charles Canady introduced anti-affirmative action companion legislation in the Senate (S. 1085) and House (H.R. 2128) respectively. The proposals, collectively called The Equal Opportunity Act of 1995 (EOA), were designed to do on a national basis what CCRI was created to do for the State of California. The EOA tried to accomplish two broad goals: equal treatment and equal opportunity. Equal treatment in the sense that all American citizens are treated impartially by the Federal Government in the areas of employment, contracting/subcontracting, and Federally-conducted programs (Congressional Record 1995). Equal opportunity was emphasized on the basis that the Act supported programs that were originally designed to widen the opportunities for competition while concurrently eliminating those Federal activities that created the criteria for previously described preferences programs (Franc 1996).

Ironically, the EOA was not intended to affect voluntary efforts such as minority outreach and recruitment. In fact, "casting a wider net" (Anderson 1995) to expand the pool of qualified applicants is expressly encouraged. The Act also exempted historically

Black colleges and universities in recognition of the unique role they provide in promoting educational opportunities for all Americans regardless of ethnicity.

Although the EOA was pulled from the floors of both the House and the Senate under instructions that it needed additional study (Torrey 1997), the timing of the pull was significant since it occurred just prior to the 1996 Elections. Many observers felt that it was pulled because the GOP did not want to use affirmative action as a "wedge issue" for the upcoming elections (Merida 1995). Others felt that the EOA was a dormant volcano awaiting the proper moment to erupt. Among the latter group was Shirley Wilcher, Deputy Assistant Secretary of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), who felt "[i]t's possible that this legislation could resurface at any time. It would effectively eliminate remedies for dealing with discrimination. And that's a major cause for concern" (Smith 1995).

E. CHAPTER SUMMARY

The U.S. Supreme Court is charged with "the application and interpretation of the law" (U.S. Courts 1998) independent from outside influence so that the decisions of the Court can be completely impartial and based solely on the laws and facts of the cases. This chapter attempted to show that there are factors that are relevant to the decisions that the Court makes that extend beyond the laws and facts of the cases. The most influential of these factors on any case is the political composition of the court. The Glass Ceiling Commission, CCRI, and EOA could be categorized as significant environmental factors that may have had an indirect impact in the decision process of the Justices in the *Adarand*

decision. Chapter V will analyze the *Adarand* ruling and provide significant insight into the interpretation and significance of the case and opinions.

V. *ADARAND V. PEÑA*

In a speech shortly before his death, former Supreme Court Justice Marshall said "[t]he legal system can force open doors, and, sometimes, even knock down walls, [b]ut it cannot build bridges," (Johns 1998). The U.S. Supreme Court has struggled to develop clearly a test that would balance congressional use of affirmative action in its present context. Supreme Court cases prior to *Adarand* attempted to interpret the appropriate implementation of affirmative action for state, local, and Federal programs in the areas of education, contracting, and media licensing.

Adarand was a constitutional challenge to a DoT program that compensated companies that received prime Government contracts for hiring subcontractors certified as disadvantaged businesses controlled by minorities. As noted in Chapter II, the legislation on which the DoT program is based, the Small Business Act, establishes a Government-wide goal for minority subcontracting participation. Although *Adarand* involved Government contracting, the Supreme Court's ruling applies whenever a Federal Government agency voluntarily adopts racial or ethnic classification as a basis for decision making.

A. BACKGROUND

In 1989, Adarand Constructors, Inc. submitted the low bid on a DoT subcontract to build guardrails on a major highway contract in the state of Colorado. However, the prime contractor, Mountain Gravel & Constructors Co. (MGC) awarded the subcontract

to a minority-owned firm, Gonzales Company, whose owners were presumed to be socially disadvantaged. By awarding the subcontract to Gonzales, MGC was then eligible to receive additional compensation from DoT. DoT established a set-aside goal for all SDBs in Federal highway contracts in accordance with the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA). STURAA enabled states "to expend a minimum of ten percent of Federal-aid highway contracts with small businesses owned and controlled by socially and economically disadvantaged individuals" (P.L. 100-17). In this particular case, MGC could be granted up to a $10,000 bonus (ten percent of the $100,000 subcontract) for subcontracting with a minority firm. The contract clause that directed this action indicated that:

> The [prime] Contractor will be paid an amount computed as follows...If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
> (*Adarand* p. 209)

Adarand's bid was received at $1,700 less than Gonzales' bid, but MGC decided to forfeit the $1,700 difference, award to Gonzales, and collect the additional $8,300 (Oliver 1995). Adarand sued DoT, headed by Secretary of Transportation Federico Peña, arguing that it was denied the subcontract because of a racial classification, in violation of the equal protection component of the Fifth Amendment's Due Process Clause. Randy Pech, Co-founder and General Manager of Adarand, summarized his company's frustration: "[W]e lost yet another job, not because of a poor reputation, not because our price was too high,

not because we submitted our bid late, not for any reason but one, I as owner and operator of Adarand was a white male" (House of Representatives 1997).

The United States District Court which had jurisdiction over Federal cases in Colorado granted summary judgment for DoT. The U.S. Court of Appeals for the Tenth Circuit, which hears Federal appeals from Colorado and other mid-western states, affirmed the district court's ruling, holding that DoT's race-based action satisfied the requirements of intermediate scrutiny. Intermediate scrutiny was the level of scrutiny that was established in Federal affirmative action cases as noted in *Fullilove* (448 U.S. 448 1980), and *Metro* (497 U.S. 547 1990). In those cases the Court determined that the test for intermediate scrutiny required finding that the program must serve important Governmental objectives and be substantially related to achieving those objectives (Billawala 1995). In other words, intermediate scrutiny requires the balancing of legislative priorities against judicial values.

Adarand appealed to the Supreme Court, arguing that the racial classification, and the presumption of economic and social disadvantage, are an unfair burden on white firms that do not benefit from this presumption (*Adarand*, p 200). Counsel for Adarand, Mountain States Legal Foundation (MSLF), also argued that the 1.5 percent compensation for hiring SDB firms unlawfully burdened Pech's equal protection rights as a non-beneficiary.

Arguing for the Government, U.S. Solicitor General Drew S. Days III tried to save the Government's set-aside programs by arguing to the Court that they are "based on

disadvantage, not race" (Savage 1995). In the original language of the Small Business Act that STURAA is based upon, the program is actually dependent on social disadvantage. But it is well documented that the use of many Government set-aside programs is slanted more so on the basis of race than disadvantage (Thernstrom and Thernstrom 1998).

B. THE HOLDING

"Five votes can do anything around here," (Lacayo 1995) was an adage of Justice Brennan about the fragility of the voting power on the Court. The Supreme Court announced its ruling 12 June 1995, nearly six years after Pech and MLSF sued DoT. In a five to four vote, the Court held that "strict scrutiny" was now the standard of constitutional review for Federal affirmative action programs that use racial or ethnic classifications as the basis for decision making. Justice Marshall once quipped that strict scrutiny is "strict in theory, but fatal in fact" (*Fullilove* p. 519), meaning that it is very difficult for programs subjected to this level of scrutiny to pass the test. Only twice in the Supreme Court's history have Federal racial classifications survived using the Constitution's toughest test and those occurred during the Japanese-American internment cases during World War II (Coyle 1995).

By using the strict scrutiny standard, the Court overruled the preceding standard of intermediate scrutiny, the level of scrutiny that had previously been applied to Federal affirmative action programs since *Metro.* The Court viewed *Metro* as an aberration, breaking with the holdings and rationales of the previous decisions leading up to Croson (Salazar 1995). In overruling *Metro,* the Court broke with the tradition of "stare decisis"

(*Adarand* p. 231) the principle of law by which there exists a legal precedent from a previous decision (Random House 1993), which in this case was *Metro's* intermediate scrutiny. In *Adarand* the Court ruled that the Federal standard is now the same more rigid standard that applies to state and local governments as handed down in the *Croson* (488 U.S. 469 1989) ruling:

> We hold today that all racial classifications, imposed by whatever [F]ederal, state, or local [G]overnment actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that [*Metro*] is inconsistent with that holding, it is overruled.
> (*Adarand* p. 227)

Strict scrutiny would now require any Federal program that makes race a basis for dealing with contracts to be "narrowly tailored" to serve a "compelling [G]overnment interest" (Latham and Hewitt 1995).

The Department of Justice (DoJ) indicated that courts have identified six principal factors in giving meaning to the narrow tailoring aspect of strict scrutiny:

- Whether the Government considered alternatives such as race neutral actions to determine that they would prove insufficient before resorting to race-conscious action.
- The scope and flexibility of the program.
- Whether race is the sole factor in eligibility, or whether it is used as one factor in the eligibility determination.
- Whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool.

- Whether the duration of the program is limited and whether it is subject to periodic review.
- The extent of the burden imposed on nonbeneficiaries of the program.

(DoJ 1995)

DoJ further notes that not all of these factors are relevant in every circumstance. Courts generally consider a strong showing with respect to most of the factors to be sufficient.

Under the guidelines of the *Adarand* ruling, without a compelling governmental interest race-based classifications in Federal, state, and local programs will be deemed unconstitutional. In order to use preference programs, the Government must determine that there is sufficient justification to determine compelling interest. In her majority opinion, Justice Sandra Day O'Connor stated that in order to prove compelling interest the Government must show that, "the persistence of both the practice and the lingering effects of racial discrimination has diminished contracting opportunities for members of racial and ethnic minority groups" (*Adarand* p. 237).

In rendering its opinion on *Adarand*, the Supreme Court did not say that all Federal affirmative actions programs were unconstitutional (DoJ 1995). It only raised the bar of the standard by which these programs will be judged. The Court's decision in *Adarand* is more extensive than affecting only Federal contract programs. The ruling in *Adarand* applies to all voluntary Federal affirmative action programs where a race-based presumption forms the basis for decisionmaking (DoJ 1995). *Adarand* thus reaches Federal programs in health, education, and employment in addition to awarding contracts. By using the newly imposed strict scrutiny standard, the Court did not find the program

challenged in *Adarand* unconstitutional, but instead sent the case back to the lower courts to make that determination (Hatch 1997).

C. THE MAJORITY OPINION

Within the 5-4 opinion reached in *Adarand*, there was a 2-2-1 split among the majority as to the degree of how affirmative action should be affected. Two Justices wanted to abolish affirmative action all together, two wanted to change the current system, and Justice O'Connor's position lay somewhere in the middle of these two groups.

1. The Hard-liners

Justices Antonin Scalia and Clarence Thomas had by far the most restrictive opinions on affirmative action. Justice Scalia concurred with Justice O'Connor's opinion except on the issue of affirmative action righting past wrongs. In his separate opinion he wrote, "[G]overnment can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction" (*Adarand* p. 239).

Justice Scalia is well known for his fierce opposition to affirmative action of any kind, especially those designed by local governments to give an advantage to minorities competing for contracts (Savage 1996). His opinion, also reflects that it is not the Government's place to correct the wrong doings of the past:

> Individuals who have been wronged by unlawful racial discrimination should be made whole but under our Constitution there can be no such thing as either a creditor or debtor race...To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.
> (*Adarand* p. 239)

It came as no surprise to Supreme Court observers that Justice Scalia voted in the majority on *Adarand*. Proud of his Italian American heritage, a portion of his disdain for such programs may be reflected in his upbringing, "[n]ot only had [my father] never profited from the sweat of any black man's brow, I don't think he had ever seen a black man" (Kunen 1996).

Justice Thomas, considered the most antagonistic affirmative action opponent on the Court (White 1995), called any such preference programs "racial paternalism" and felt, "[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple" (*Adarand* p. 241). Affirmative action, according to Justice Thomas, is discriminatory and demeans minorities by leading others to assume all minorities are inferior and need special help to succeed (Benedetto 1997).

For reasoning such as this, compounded with his other ultra-conservative opinions, Thomas has been thoroughly denounced by many in the African American community as a traitor (much like Ward Connerly for his involvement in CCRI). Ted Shaw, the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund lawyer, indicates that because Justice Thomas is an African American,

"the positions he takes in race cases give a little bit more encouragement to other Justices who advance views that are at odds with those of most black Americans" (White 1995).

Collectively, Justices Scalia and Thomas assert that no Federal affirmative action program can survive the level of scrutiny that will now be applied following the *Adarand* ruling (Kunen 1996). Although they would have preferred to take an even harder line on the issue of affirmative action with the conservative voting block that is presently convened on the Court, Justice Scalia, and to a lesser degree Justice Thomas, are confident that this upheaval will occur in a matter of time (*Adarand* p. 239).

2. The System Needs Work

Chief Justice William Rehnquist and Associate Justice Anthony Kennedy voted with the majority in *Adarand*, but their stance was somewhat left of the right on the political continuum from those views held by Justices Scalia and Thomas. Chief Justice Rehnquist, a staunch conservative, purposely positioned himself near the center of the continuum in an effort to disassociate himself from ideology of the perceived extremist, Justice Scalia (Savage 1996).

Chief Justice Rehnquist argued that he was not against Congress' original intent in developing programs to assist those who had been disadvantaged, it was the manner in which this assistance was provided that concerned him: "Why couldn't Congress do without this presumption [that all minorities are considered disadvantaged economically and socially] and give preferences to entrepreneurs who have suffered some type of disadvantage regardless of their race" (Savage 1995). Although this voting contingent did

not make as much noise concerning the impact of the outcome of the *Adarand* decision as their plurality brethren, their votes figuratively spoke volumes about the direction that the Court was headed on the issue of affirmative action.

3. The Swing Vote

The deciding vote on *Adarand* came from Justice O'Connor who consistently straddled the issues on whether to take a hard or moderate stance on the issue of affirmative action. Her voting position has been considered as a "swing vote" because she moves "between the conservative and moderate blocs on the court" (Marquand 1997). Although she has a conservative approach, she was placed in an ironic situation by playing such a pivotal role in this case. Justice O'Connor believes (much like Justice Scalia's position) that Government should have a limited role in solving society's problems, but on the other hand she has experienced bias by being offered a job as secretary in a prestigious law office upon graduating from Stanford (Biskupic 1997). From this experience she persevered to become the first female Supreme Court Justice.

In rendering her opinion, Justice O'Connor initially reviewed the Court's historical treatment of both Federal and state race-based actions. She highlighted that since the *Croson* case it has been well settled that state government race-based action is subject to strict scrutiny (*Adarand* p. 222). This review led her to conclude that the Court had only recently abandoned its traditional strict scrutiny of race-based action in favor of an intermediate scrutiny of such actions (Hinkle et al., 1995), as previously directed by the *Metro* case.

Considerable attention was drawn to the fact that her lead opinion attempted to eliminate the sentiment of former Justice Marshall when she noted, "[w]e wish to dispel the notion that strict scrutiny is 'strict in theory and fatal in fact'" (*Adarand* p. 237). By doing so she sends a message that the decision presented by the Court that affirmative action is not dead, but will be viewed under a more watchful eye. Many legal experts feel that the strict scrutiny doctrine applied in the *Adarand* case is a "kinder and gentler" strict scrutiny which is far different than the theory that is taught in law schools or applied in court (Coyle 1995). Douglas W. Kmiec, of Notre Dame Law School, states: "Justice O'Connor does believe, in her opinion, it is possible to survive strict scrutiny, but we don't have any examples and so on remand, there's lots of tough work for this judge and later for others" (Coyle 1995). This may lead to the possibility that Federal trial judges, faced with challenges to Federal race-based programs and preferences, likely will struggle with whether they are to apply the old strict scrutiny or the new *Adarand* version of it.

Justice O'Connor admits in her opinion that racism persists (Greenberg 1995), and states unequivocally, "the [G]overnment is not disqualified from acting in response to it" (*Adarand* p. 237). With the *Adarand* decision, it is the manner in which Government is permitted to act that has been recalibrated.

D. THE DISSENTING SIDE IN *ADARAND*

Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John P. Stevens dissented indicating that "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country" shows there is still

a need for affirmative action in America today (DoJ 1995). In Justice Stevens' dissenting opinion he attempted to pick apart the three themes upon which the majority had based their ruling: "skepticism, consistency, and congruence" (*Adarand* p. 242).

Justice Stevens disagreed with the Court's use of the concept of congruence. The majority assumed that there is no significant difference between a decision to adopt an affirmative action program by the legislative branch of the Government at the Federal level to that by a State or a municipality. In response to this theory Justice Stevens retorts, "[i]n my opinion that assumption is untenable. It ignores important practical and legal differences between [F]ederal and state or local decisionmakers" (*Adarand* p. 243). His main point of emphasis is in previous cases in which affirmative action programs were viewed before the Court, *Fullilove*, *Metro*, and especially *Croson*, the same distinction was noted to not be true. In the majority opinion of *Croson*, Justice O'Connor discussed the issue of congruence between policy implementation at the Federal and state/local levels:

> What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to enforce may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.
> (*Croson* p. 490)

What the Court held to be the congruent standard for those previous cases had suddenly shifted when it came to the *Adarand* case.

Skepticism existed in the belief that it is necessary for all racial classifications or preferences that are based solely on racial or ethnic criteria must receive the closest examination possible (Salazar 1995). The fact that skepticism must be consistent with the level of scrutiny for Federal affirmative action programs as that of state and local programs (Savage 1995) is one of the concerns of the dissenting Justices. The scope and policy of the Federal Government extends further than that of the states and localities. States' and localities' focus for application of affirmative action programs are more appropriate for the communities they serve; therefore, there is a need for more scrutiny than on the national basis.

Of the three themes, the one that is most notable and draws an inordinate amount of the dissent argument is that of consistency (Toenjes and Kountze 1995). To illustrate this point, the conservative portion of the Court tries to provide a sense of impartiality in maintaining that using preference programs to right past wrongs is no different than the injurious discrimination that occurs against minorities (*Adarand* p. 241). Justice Stevens countered this argument with:

> Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to govern impartially should ignore this distinction...The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat.
> (*Adarand* p. 243)

The position that Justice Stevens takes in *Adarand* is noteworthy, considering the fact that his attitude shifted substantially since his earlier posture of being an affirmative action skeptic to the point of being an impassioned champion. To illustrate the significance of this change of theory, recall it was Justice Stevens who cast the deciding vote on *Bakke* (438 U.S. 265 1978), to now write the lead dissenting opinion on *Adarand*.

Of the remaining dissenting Justices, Justice Ginsburg's opinion offered the most revealing attempt to clarify the Court's newly adopted position on affirmative action for Federal programs. She argues that Justice O'Connor's opinion, in conjunction with the dissenting opinions, demonstrates:

> [C]ommon understandings and concerns revealed in opinions that together speak for a majority of the Court... [The several opinions *Adarand* indicate] the Court's recognition of the persistence of racial inequality and a majority's acknowledgment of Congress' authority to act affirmatively, not only to end discrimination, but also to counteract discrimination's lingering effects.
> (*Adarand* pp. 271-272)

In a sense she tries to put a positive conservative spin on Justice O'Connor's lead opinion, noting "today's decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions" (*Adarand* p. 276). Translated into common everyday English, Justice Ginsburg hopes to re-interpret or override *Adarand* at the first available opportunity (Calabresi 1996).

E. AFTERMATH OF *ADARAND*

Upon making its decision, the Supreme Court did not rule on the case itself, but remanded it to the Federal District Court in Colorado for adjudication based upon the strict scrutiny standard (Garfield 1997). On 2 June 1997, nearly two years after the Supreme Court's decision, Judge John L. Kane, U.S. District Court Judge for the District of Colorado, ruled that the Federal programs upon which Adarand sued were unconstitutional under the strict scrutiny review (Turner 1997). In applying the standard of strict scrutiny, Judge Kane concluded that its application to all offerors, including Federal racial classifications, "would ensure that only those which are narrowly tailored to serve a compelling governmental interest are tolerated" (DoC 1997). Adarand had won the battle (an eight-year battle), but the war rages on.

F. CHAPTER SUMMARY

Opponents and proponents of *Adarand* alike are mixed on what impact the ruling would have on affirmative action programs. John H. Roberts, of Washington D.C.'s Hogan & Hartson, counsel to the Association of General Contractors of America Inc., which supported Adarand in its Supreme Court challenge feels,

> I think it's clear the opinion went out of its way to emphasize it was not predicting results in any particular case...On other hand, strict scrutiny is something lawyers who practice in the equal protection area are familiar with: It is an exceedingly exacting standard.
> (Coyle 1995)

Evidence of the *Adarand* remand decision alone has affirmative action proponents fearing the worse. "It has been a rocky road for small black businesses over the past several years. And there appears to be little relief in sight" (Beech 1997).

Chapter VI will take a look at what has happened with Federal socioeconomic programs in the Post-*Adarand* era and determine the impact of these changes on the future of Federal contracting.

VI. POST-*ADARAND*

"When a newspaper reporter asked Mark Twain in 1897 to respond to the news of his death, he said: 'Reports of my death have been greatly exaggerated'" (Shalala 1994). Much like the premature reports of Twain's death, the same can be said about affirmative action in response to the *Adarand* decision.

Headlines following the Supreme Court's decision on *Adarand* indicated: "United States Supreme Court Strikes Blow Against Government-Imposed Racial Preferences" (Hinkle et al 1995); "'Quotas Quashed'... 'High Court Sinks Most Affirmative Action Programs'" (Jackson 1995); "A New Push for Blind Justice" (Lacayo 1995); "Rolling Back Quotas" (Lowry 1996); "The End of Affirmative Action" (Hobbs 1997); and the list goes on and on. Although the *Adarand* decision was considered a major setback for proponents of affirmative action, and a victory for its opponents, the issue is far from dead.

In a statement issued the day after the Court's decision, President William Clinton rebuked the remarks on false accounts of the death of affirmative action,

> Exaggerated claims about the end of affirmative action — whether in celebration or dismay — do not serve the interest all of us have in a responsible national conversation about how to move forward together and create equal opportunity...The Supreme Court has raised the hurdle, but it is not insurmountable.
> (White House July 1995)

Although preceding instances of cases that fought the strict scrutiny principle—and won—are hard to find (Coyle 1995), the statement by Justice Sandra Day O'Connor that

the principle is not fatal leaves the door partially open for the most optimistic of affirmative action proponents.

The initial feedback has been somewhat mixed with opponents claiming victory and proponents conducting damage control. William Perry Pendley, President of Mountain States Legal Foundation who took on Adarand's case, stated "I frankly think that the program is a dead duck" (Jost 1995). While on the other side of the issue, Christopher Edley Jr., who was overseeing the Clinton Administration's review of affirmative action programs predicts, "I'm confident there will be a great many programs that will survive strict scrutiny under *Adarand*" (Jost 1995). To date there have not been any major challenges to affirmative action following *Adarand*.

This Chapter will analyze the actions that took place in Federal contracting on affirmative action within the period that is now referred to as the "Post-*Adarand* Era" (Mayor 1996). In this Post-*Adarand* Era, the term Adarand itself has taken on the form of an adjective used to describe the demarcation of whether a program used an intermediate level of scrutiny (Pre-*Adarand*) or a strict level of scrutiny (Post-*Adarand*). Although at the time of this research the Post-*Adarand* period has been in effect for less than three years, significant changes have already taken place in Federal contracting. Analysis of the changes may offer a glimpse of what we should expect of further *Adarand* changes in the future and how those changes affect the Federal contracting process.

A. "MEND IT, DON'T END IT"

In response to the preference program review requested by Senator Robert Dole in early 1995 (as discussed in Chapter III), President Clinton ordered all agencies in the Executive branch in March of 1995 to conduct their own in-depth reviews of all programs, policies, and initiatives that had affirmative action ties (Stephanopoulos and Edley 1995). The President's order had agencies inquire as to what kinds of Federal programs and initiatives are now in place, and are they fair to the recipients and others?

In a memorandum to all agency heads following the *Adarand* decision, the President further required a review of race and sex based programs' policy principles, and for the elimination or reform of any program if it:

- creates a quota;
- creates preferences for unqualified individuals;
- creates reverse discrimination (or discrimination of any kind); or
- continues even after its equal opportunity purposes have been achieved.

(The White House June 1995)

Once the Supreme Court handed down its decision on *Adarand*, the initial review was adjusted to reflect the application of strict scrutiny as directed.

In a speech given on 19 July 1995 at the National Archives, President Clinton rededicated his administration's commitment of continuing socioeconomic policy through the use of affirmative action when he stated, "[b]ased on the evidence, the job is not done. So here is what I think we should do. We should reaffirm the principle of affirmative

action and fix the practices. We should have a simple slogan: Mend it, but don't end it" (The White House July 1995). In light of the fact that the speech was delivered with the 1996 presidential election looming a little more than a year away, the message tossed the gauntlet squarely in the direction of the President's adversaries. He felt that many Republicans were using affirmative action as a political tool "to use the anxieties of the middle class...to play politics with the issue of affirmative action and divide our country at a time when we have to be united" (The White House July 1995).

Critics of the President who felt that he had taken the middle of the road on previous issues were surprised to see that he entrenched himself deeply with the proponents' position on the issue of affirmative action (Carney 1995). Considering that the Republican party had recently captured the majority in Congress riding the wave of the angry white males' support to victory on their "Contract With America" platform, it seemed like a sure thing that President Clinton would cater to that very same voting contingent.

One possible reason for the President's position is because his staff had done its homework on the issue. A *Time*/CNN poll taken shortly after the speech reflected that many Americans felt the same way he did, 65 percent wanted affirmative action mended and 24 percent wanted it ended (Carney 1995). Another reason could have been for political consistency, in his speech the President sharply attacked political chameleons:

> There are a lot of [politicians] who oppose affirmative action today who supported it for a very long time. I believe they are responding to the sea change in the experiences that most Americans have in the world in which we live.
> (The White House July 1995)

This strategy of the President is verified by a senior presidential official, "[President] Clinton has supported affirmative action his whole career and can't back away" (Carney 1995).

B. JUSTICE DEPARTMENT REVIEW

In coordinating the review of Federal affirmative action programs that President Clinton directed agencies to undertake in light of *Adarand*, DoJ has collected evidence that reflects the required proof of discrimination (DoJ 1995). Information provided in DoJ's preliminary findings indicates that racially discriminatory barriers hamper the ability of minority-owned businesses to compete with other firms on an equal footing in our nation's contracting markets. These barriers consist of discrimination from trade unions, lenders, and most notable in this study discrimination by prime contractors (DoJ 1995). In short, what the study suggests is that there is indeed a compelling interest to take remedial action in Federal procurement.

White House Senior Advisor George Stephanopoulos and Mr. Edley, Special Counsel to the President, relied heavily on DoJ's initial findings in compiling their report to the President on affirmative action. Their report was released 19 July 1995, the same day that President Clinton delivered his "Mend it, but don't end it" address.

The long-awaited DoJ report regarding reforms to affirmative action in Federal procurement was published in the Federal Register on 23 May 1996 (Zirkin and Brown 1997). In the release, DoJ identified six factors to address the aspect of strict scrutiny:

- whether race neutral alternatives were considered;
- the scope and flexibility of the program;
- whether race was relied upon as the sole factor or one factor in the eligibility determination (the *Bakke* test);
- whether numerical targets were reasonably related to the number of qualified minorities available;
- the duration of the program and whether it was subject to periodic review; and
- the burden imposed on nonbeneficiaries of the program.

(DoJ 1996)

The factors identified in DoJ's report mirror and enhance those criteria that President Clinton outlined in the order to review all Federal race and gender-based affirmative action programs.

C. SUSPENSION OF THE "RULE OF TWO"

Since DoD conducts a substantial amount of the Federal Government's procurement, the focus of initial post-*Adarand* compliance actions by the Justice Department's review was concentrated in the areas of defense (Dellinger 1995). The review examined the application of affirmative action policy on more than 160 programs Governmentwide (CRS 1995). Of those programs, only one was affected—DoD's "Rule of Two" (discussed briefly in Chapter II). In Fiscal Year (FY) 1994, $1 billion was

awarded to SDBs as prime contractors under the Rule of Two program, and more than $500 million through the first three quarters of FY 1995 (Latham 1995).

A Minneapolis-based construction firm, C.S. McCrossan Inc. (Horowitz 1995), challenged the legality of the Rule of Two and in October 1995, upon advisement from DoJ, DoD suspended use of the program (Dellinger 1995). Associate Attorney General John R. Schmidt stated in an interview that the major reason DoJ advised DoD to suspend the program was that it did not meet the Supreme Court's narrow tailoring concept provided in *Adarand*:

> What makes the Rule of Two more vulnerable is that it is stated in such an absolute fashion, and in a sense appears to be an arbitrary rule...Narrow tailoring, such as looking at what the impact is in a particular region, is not available under this rule.
> (Latham 1995)

Rep. Charles Canady, co-author with Senator Robert Dole on the Equal Opportunity Act of 1995 stated, "[the Rule of Two] is patently unconstitutional, and the decision to suspend it was really a no-brainer" (*Engineering News-Record* 1996).

In the statement that announced the DoD's decision to suspend the Rule of Two, Undersecretary of Defense for Acquisition Paul G. Kaminski advised, "all DoD contracting activities to use their utmost skill and existing authorities to increase awards to SDBs" (OASD October 1995). Deputy Secretary of Defense, John White, reiterated this sentiment by remarking that the suspension of the Rule of Two "did not reflect any change in [DoD's] commitment to bring small business into the defense industrial base" (Coleman 1996).

Upon announcing suspension of the Rule of Two program (a program that was obviously well liked by SDBs), DoD soon thereafter proposed a series of interim programs to ease the effect of the change until more definitive interpretation of the *Adarand* ruling came along. Those changes consisted of:

- expanding the mandatory use of the ten percent price preference for SDBs, to include competitive awards based on other than price or price related factors;
- consideration of small, small disadvantaged, and women-owned small business subcontracting as a factor in the evaluation of past performance;
- requiring prime contractors to notify the contracting officer of any substitutions of firms that are not small, small disadvantaged, or women-owned small businesses for the firms listed in the subcontracting plan; and
- establishing a test program of an SDB evaluation preference that would remove bond cost differentials between SDBs and other businesses as a factor in most source selections for construction acquisitions.

(OASD December 1995)

By introducing these proposals, DoD felt they would significantly enhance the opportunities for SDBs to participate as important elements of the defense industrial base and comply with *Adarand*, while easing the sting of the Rule of Two suspension (OASD December 1995). The four proposals were received with guarded optimism by members of the SDB community. "[DoD] need[s] to quit messing around with all this other stuff and restore the Rule of Two," declared Hank Wilfong, President of the National Association of Small Disadvantaged Businesses (Erlich 1996). Although intended to

provide some relief in the place of the Rule of Two Program, the programs would not fill the void created by the loss of the $1 billion program.

Present policy dictates that use of the Rule of Two is only authorized by the Office of Federal Procurement Policy (OFPP) when census data indicates that SDBs in certain industries exceed the percent of Federal Government SDBs contracting in those industries (Spector 1997).

D. FAR CHANGES

On 9 May 1997, the Government announced proposed changes to the Federal Acquisition Regulation (FAR) to comply with the *Adarand* requirements affecting SDBs (Federal Register 1997). The section of the FAR that is primarily affected is Part 19, Small Business Programs, which was expanded by the addition of two new subparts to accommodate those changes (GSA 1997).

The proposed FAR changes were designed to provide three mechanisms through which disadvantaged status of a business would be involved: a price evaluation adjustment, a source selection evaluation factor, and monetary incentives (Janik 1997). Under the proposed FAR revisions, the three SDB procurement mechanisms would be authorized where actual SDB participation falls below a Department of Commerce (DoC) established benchmark. The benchmark is determined by whether SDB participation in a particular industry is below the level at which it could have been had it not been for past discrimination (Brittin 1997). These benchmarks could be "adjusted upward if there is some evidence that discrimination has suppressed the availability of minority firms in that

industry" (Rosen 1996). With these changes the Federal Government believes it has instituted a system that complies with the *Adarand* changes.

One of the mechanisms provides a mandatory price evaluation credit of up to ten percent for SDBs and for non-SDB firms that decide to subcontract with SDBs (Federal Register 1997). The price evaluation credit will be applied on a line item basis. The contracting officer will identify the affected line items and the extent of the evaluation adjustment credit in the solicitation (Janik 1997).

The second mechanism maintains that by participating in the evaluation factor or subfactor program of Federal procurement, the solicitation requires that specific qualities or attributes of offerors must be available in order to participate in the procurement (Janik 1997). These attributes or qualities that are required will be relied upon heavily in the source selection process. Participation in this program is mutually exclusive with participation in the price adjustment program previously discussed. Therefore, SDBs who participate in the evaluation factor program waive their right to participate in the ten percent economic price adjustment program (FAR 19.11).

The final mechanism uses cash bonuses as a catalyst to bolster change. The use of monetary incentives to prime contractors for subcontracting with SDBs is reflected in FAR 19.12 (Federal Register 1997). The incentive award is based on the actual performance of the SDB in the contract participation, not the prime's intention to use SDBs (Janik 1997), in contrast with the subcontracting plan. The subcontracting plan cites the potential use of SDBs to meet Government requirements for offerors, whereas

reference to the FAR change provides monetary rewards for actually subcontracting with SDBs (FAR 19.12).

Proponents and opponents of affirmative action alike have soundly criticized the changes as being too restrictive or not restrictive enough. Weldon Latham, General Counsel of the National Coalition of Minority Businesses (NCMB) and affirmative action proponent testified that the changes are, "unnecessarily restrictive in limiting the tools available to achieve a fairer contracting environment for minority businesses and go well beyond what is necessary to meet the strict scrutinizing standard" (House of Representatives 1997). While affirmative action opponent and the General Counsel of the Associated General Contractors of America (AGC) Michael Kennedy testified:

> The most pernicious [of the FAR changes] would be a prime contract bid preference for small minority businesses...Yet another would be an "incentive payment" much like if not identical to the clause that lay at the heart of the *Adarand* case.
> (House of Representatives 1997)

E. PROPOSED SBA 8(A) PROGRAM CHANGES

The SBA issued a proposed regulation on 14 August 1997 that revised its existing 8(a) program (Federal Register 1997). The 8(a) program represents some 40 percent of all Federal procurement dollars received by SDBs (Henderson 1995). In FY 1997, the program accounted for more than $6.2 billion in Federal contracting (FPDC 1998); therefore, the magnitude of the program is very significant towards the Government's policy to implement socioeconomic policy.

The restructuring of the 8(a) Program has four principal objectives:

- to create a mentor-protégé, program encouraging private-sector relationships;
- to help small businesses compete for larger Federal contracts through changes in affiliation rules;
- to provide a more equitable distribution of contracting opportunities; and
- to revise the standard for proving "social disadvantage" to be consistent with recommendations of the DoJ.

(SBA 1997)

These changes to the 8(a) program are designed to fortify the program under the level of scrutiny that the *Adarand* case now prescribes. It is questionable if the changes involved are all the product of *Adarand*. Although the Supreme Court referenced the program several times in its *Adarand* discussions, it did not find any aspect of the 8(a) program to be unconstitutional (Latham 1997).

Patterned after DoD's highly successful program, the SBA'S Mentor-Protégé program implementation is perhaps the most productive change to the 8(a) program. In the spirit of public-private partnership, the SBA would tap into the expertise of private industry to provide developmental assistance to 8(a) certified firms (Latham 1997).

Robert Neal, Pentagon Director of Small and Disadvantaged Business Utilization, commented on how the DoD's program grew in prominence following the *Adarand* decision, "[i]n the post-*Adarand* environment, we see the Mentor-Protégé Program as the foundation of all [DoD] assistance to small and disadvantaged businesses" (Erlich 1997). The success of the program provided the motivation for the SBA to create a similar program. As of May 1998, DoD's program had 106 mentors and 171 protégés (Mentor

Protégé Program 1998). The major difference between the SBA's program and DoD's is the source of the mentor pool. DoD's program uses major defense contractors as mentors, whereas the SBA's program uses previous 8(a) Program graduates (Latham 1997). By using 8(a) grads, the SBA is giving these mentor firms the opportunity to refine and use some of the skills they received while in the program as well as to guide fledgling firms. It is a "win-win" proposition for all participants.

Another of the changes to the 8(a) program would give SDBs more latitude to form joint ventures so they can compete for larger contracts. Increasingly, Federal agencies have begun to bundle many small contracts into single, large awards of $10 million or more (Jones 1997). Bundling refers to the combining of smaller contracts into a single larger contract and tends to have an adverse affect on minority businesses who do not have the resources to compete for these larger contracts (Latham 1996). With the new changes, the SBA has relaxed some of the previous alliance restrictions so that SDBs can form partnerships to better compete for these types of contracts.

The basic intention of the SBA's 8(a) program is to provide an opportunity for all certified participants to receive a share of the economic pie provided by Government procurement through business development (SBA 1997). But even within the program there is evidence that the distribution of the economic prosperity is less than equitable. An SBA analysis prior to the *Adarand* decision revealed that the largest 200 of 8(a) certified firms accounted for 54 percent of the total available contract dollars (Horowitz 1995). This amounted to three percent of all 8(a) firms getting over half of the program's

available dollars. To remedy this problem, changes to the program would implement a ban on sole-source contracts to an 8(a) firm following any year upon graduation in which the 8(a) entity failed to achieve its business-mix target, until the 8(a) company has increased its non-8(a) contracts (Latham 1997). The purpose of this change is two-fold: to wean graduate firms off the dependency of Government contracts and to provide other 8(a) companies an opportunity to participate.

One of the most commonly voiced problems with the 8(a) program is the definition of the term disadvantaged. Recall it was the disadvantaged label that was at the center of the controversy with Adarand Constructors. One Washington insider said about the ambiguity of the requirements, "[a]round 99 [percent] of all Americans fall below the required asset ceilings, minus company and home equity. If Bill Gates lived in a small home, and invested in nothing but Microsoft stock, he'd qualify under Section 8(a)" (Horowitz 1995).

The most important aspect of this change to participants is the fact that the SBA is liberalizing the standards for entry into the 8(a) program (Green 1997). In the past it was extremely difficult for a non-minority firm to meet the requirements of the program. A non-minority firm must still prove it is owned and controlled by a person who is socially and economically disadvantaged (Beech 1997). However, the legal standard of proof has been somewhat relaxed. Prior to *Adarand*, a firm had to make its proof to the SBA by "clear and convincing evidence," a difficult standard to verify. Now the firm must merely

prove its status by a "preponderance of the evidence," (Petrillo 1997) essentially meaning that acceptance into the program is highly likely.

The change that now allows non-minorities access to the program have been met with firm opposition by affirmative action proponents. "We are very bothered by that...Unless there's a significant increase in the pie, some of the work that would have gone to minority contractors will now go to female white contractors," says Sam Carradine, executive director of the National Association of Minority Contractors (Jones 1997).

F. DISPARITY STUDIES

Following the *Croson* case, one effective tool that state and local governments used to justify the existence of their affirmative action program was the disparity study or as it is sometimes called – the market study (Alford 1997). A disparity study analyzes differences between the availability and utilization of minority and women owned firms (Toenjes and Kountze 1995). In order to show an actual need for justifying the affirmative action program, the Court ruled that "significant disparities between the level of minority participation in a particular industry and the percentage of qualified minorities in that pool" (Federal Contracts Report 1995).

Under the terms imposed by the use of strict scrutiny, race-conscious procurement could likely be allowed only after a disparity study finds credible evidence of the existence of discrimination (Devroy 1996). The use of the disparity study satisfies both the narrow tailoring and the compelling Government interest prongs of the strict scrutiny test. In

justifying narrow tailoring, the study is used to emphasize the disproportionate share of contracts awarded to certified minorities in relation to the overall pool of contractors available (Rice and Mongkuo 1998). Disparity studies also analyze "evidence of private marketplace discrimination, and any evidence of the jurisdiction's passive or active participation in such discrimination" (Toenjes and Kountze 1995) to prove compelling interest of the Government to establish remedies.

One of the indirect outcomes of the DoJ study was that the department became a centralized repository for all state and local disparity studies (Ziehl 1996). Serving as the central collection point would provide a pipeline of beneficial information to DoJ attorneys that were required to defend affirmative action cases in court. Pending legislation testing the *Adarand* changes and further examination of the disparity studies could subsequently determine if there would be a need for DoJ to conduct a National disparity study (Ziehl 1996).

Despite the fact that disparity studies provides data that could support the evidence of discrimination, they are not the cure-all to end-all. George R. LaNoue of the University of Maryland has shown, disparity studies have proved to be so unreliable that they have failed to convince any court to uphold a set-aside program (Rosen 1996). LaNoue goes on to note that many disparity studies are extremely subjective in nature, in which advocacy groups are paid to conduct anonymous interviews to support the conclusion that minority groups and women in a particular area feel victimized by ethnic and gender slights.

G. CHAPTER SUMMARY

The *Adarand* ruling is creating some interesting challenges on the part of all concerned players. The Government is being pulled in several directions at once. It is tasked to develop or revise affirmative action programs that will withstand the strict scrutiny level of compliance, while concurrently satisfying minorities and non-minorities without polarizing either concern. Minorities are challenged with maintaining their share of the pie, that is on the verge of being snatched away altogether. While non-minorities are trying to avoid losing any more of what they had once had.

This chapter has shown that not everyone will be satisfied with the resultant outcome of the challenges and their related responses. Chapter VII will provide analysis of interviews conducted to determine how compliance with the strict scrutiny standard in the application of affirmative action is shaping the opinions and affecting the industry of Government contracting parties.

VII. INTERVIEW RESULTS

A. PURPOSE OF INTERVIEWS

Interviews were conducted to obtain insights on the impact of the *Adarand* case on the Federal Government contracting process. This research explored the perceptions of small business entrepreneurs and Government administrators about: the *Adarand* case; the effect of the case on their business; and perceived future effects of the case on the Federal contracting process.

The interviews conducted in this exploratory study provided an opportunity for participants to relate personal experiences with affirmative action within the realm of their business related activities. The interviews were also conducted to examine a sample of the small business community's knowledge of the *Adarand* case and identify their awareness of industry related developments that have occurred since the *Adarand* ruling. The interviews will offer first-hand feedback from the implementation of socioeconomic policy through the Federal contracting process. Such information is necessary to determine how the small business community is impacted by landmark Supreme Court decision.

B. INTERVIEW PARTICIPANTS

Ten research participants were interviewed for this study. Table 1 provides a synopsis of the demographics of the research participants:

Table 1. **Interview Participants' Demographics**

Business Sector	**Position within Organization**	**Industry**	**Ethnicity/Gender**	
			Minority	Non-Minority
Private	President/Owner CEO	Various Defense Related Industries	1 African-American (M) 2 Asian-American (M) 3-Hispanic (1M, 2F)	2-Male
Public	Middle Management Contracting	Contracting and Procurement	0	1-Male 1-Female

The sample of participants is not representative of the general U.S. population nor is it representative of the Federal contracting community. The participants were chosen to provide exploratory data relating to *Adarand* and the changes the case brought about. The participants were selected from a database of regional contractors provided by the Regional Contracts Department of the Fleet and Industrial Supply Center (FISC) San Diego, in addition to various Government contracting personnel referred to the researcher. The research participants primarily represented senior levels of authority within their organizations. Their positions ranged from Presidents/Owners and CEOs for the private sector participants to middle management Government contracting personnel of those participating from the public sector. Of the private sector participants, six would be categorized as minority entrepreneurs (four males and two females) and two would be considered non-minority entrepreneurs (both males). All private sector participants had been in business for more than five years and have contracted with the Government for at

least three years. The two public sector participants each have over 20 years of Federal contracting experience. All of the minority participants were 8(a) Program firms from the San Diego area.

The private sector companies performed services for the Government such as information technology consulting, construction, research and development, and heating and air conditioning maintenance. All participants were very accommodating in contributing their time and frank, honest opinions for the benefit of this research.

C. CONDUCT OF THE INTERVIEWS

The interview questions are provided in Table 2 below. Interview questions were worded so that participants could recount actual experiences and observations on affirmative action within their industry, organization, and personal interpretations. Participants were informed that the research was being conducted on an anonymous basis. By emphasizing anonymity, participants were encouraged to be open and candid with the researcher in their responses, i.e., "tell me how you actually see affirmative action, not what you think I would like to hear." Allowing participants to engage in a relaxed open environment, the researcher was more likely to obtain genuine responses on an emotionally charged issue. Due to the sensitivity of the information provided, the interviews were not recorded. The researcher felt that the introduction of a recording device would not promote an environment conducive to generate the sincere responses sought. The majority of the interviews were conducted via telephone. Each interview

lasted between 20 and 45 minutes, with the average interview lasting approximately 30 minutes.

Table 2. **Interview Questions**

1. What does Affirmative Action mean to you? Your organization (i.e. what is the interpretation of Affirmative Action in your organization)?

2. What is your candid opinion of Affirmative Action? Should it be dismantled, enhanced, reformed, etc.

3. Have you ever benefited or lost due to affirmative action? If so please elaborate.

4. Are you familiar with the *Adarand* Case?

5. The *Adarand* decision was handed down June 1995. Now that nearly three years have passed, do you feel that the amount of Government contracts (you have received) have increased, decreased, or have not changed due to the ruling?

6. What impact do you feel that the *Adarand* ruling will have on the future of Government contracting?

D. INTERVIEW RESULTS

This section of the research analyzes the response to each question individually. Responses are referenced by numbered participant in order to maintain anonymity and retain correlation to the participant.

1. **What does affirmative action mean to you? Your organization (i.e., what is the interpretation of affirmative action in your organization)?**

The majority of the participants interpreted affirmative action as a method of leveling the playing field and providing an opportunity:

> **[Affirmative action] means giving all firms a chance to bid on Government work...more notably small businesses.** (Participant #7)
>
> **[Affirmative action] means leveling the playing field. Assisting those that had problems in the past...In a sense it pretty much means jobs.** (Participant #6)
>
> **Providing opportunities to those unable to compete on equal basis in education, employment, contract awards, etc.** (Participant #5)
>
> (Using an analogy) **The paths that [society] took in the past are like that of water flowing down the side of a hill. Minorities took one path to get down the hill creating a [groove] that permanently kept them flowing in the same direction. Whites flowed down a separate path to get down the same hill, creating a similar [groove]. Affirmative action provides a bridge that channels the flow of the minorities into the path occupied by whites.** (Participant #1)

In response to the second part of the question, the private sector participants felt that the response they provided in the first part spoke for the entire organization. The following is a response of one of the public sector participants' response to how the Government interprets affirmative action:

> **Factually, progress is being made, but we still have not gotten to the core issues. That is when you make some people do it, they do it, but it does not fix the problems that cause discrimination in the first place.** (Participant #5)

2. What is your candid opinion of affirmative action? Should it be dismantled, enhanced, reformed, etc.?

The majority of the participants overwhelmingly reflected in their responses that affirmative action is needed. Many felt that the tag "minority contractor" is a discriminator from them getting jobs based on merit. Several of the minority participants admitted that they hid the fact of their minority affiliation whenever possible as their companies were just getting started:

> **I still believe minority businesses need help...There is still a very strong "Good Old Boy" network. When I first entered into this business, I tried to conceal the fact of minority ownership, because it carried a negative tag...Once we performed and word of mouth spread, our reputation, not affirmative action got us work.** (Participant #2)

> **Yes we still need it. Does it need to be fixed—yes. I think the whole system now is directed at compliance vs. fixing people's behavior. How do I change people's feelings toward contracting with minorities because they <u>want</u> to? That's the whole concept of diversity.** (Participant #5)

> **I think that affirmative action is good for the country in general, when it is applied properly. Unfortunately, liberals in Congress and on the Supreme Court have turned it into a "black vs. white" issue. I supported Civil Rights back in the 60s and 70s, but starting in the 80s affirmative action changed, mostly for the worst...The system needs to be changed.** (Participant #10)

> **It should be monitored more closely and should evolve with the times.** (Participant #6)

> **It has a good purpose...The public has a misconception of what it is about, and don't understand the purpose...[Liberals] have not publicized the [intended] purpose of affirmative action very well.** (Participant #1)

It should be reformed to reflect the different philosophies of today, rather than what it was years ago. At the time that the laws were established [the 60s and 70s] the culture and situations have changed since then. (Participant #4)

One of the responses reflected the opinion that the changes provided by the SBA to the 8(a) Program, especially the one to expand the mix of participants getting work was badly needed:

For the most part, the system is working...[It] needs some "tweeks and peeks" every now and then. Time for other firms that have not gotten as much work to get their time in the sun. (Participant #7)

3. **Have you ever benefited or lost due to affirmative action? If so please elaborate.**

Responses to this question fall among racial and gender lines. Minority and female participants responded that they had received benefits attributed to affirmative action, and non-minority males stated that they had lost because of it. Among the minorities and women, some voiced concerns that they were not particularly proud to admit the fact that they had gained, while others viewed using affirmative action as the opportunity to get a foot in the door to eventually prove their ability that otherwise would not have happened (without affirmative action).

I have personally benefited...One of the jobs I received in the past was with a company that was looking to participate in an outreach program. I proved I was qualified when I got that job and other opportunities. (Participant #7)

I have lost contracts because of it...The Government Contracting Officers would never admit it outright, that it was due to affirmative action, but anyone could see that was the real reason. Myself or ten other members of my [contracting] association could have been Adarand if we had pursued the matter. (Participant #10)

I guess I've benefited. There is a stigma that affects all minority businesses, when it comes to affirmative action. On the positive side, the 8(a) programs were established through mandates that allowed more participation for minorities. (Participant #4)

I would not have been able to become a co-owner of this company had it not been for affirmative action programs. (Participant #2)

Back in the 70s I received a promotion and someone commented "you only got it because you are a woman." But it's that whole perception that is the problem of affirmative action—to improve one person's position you have to take away from someone else's. (Participant #5)

Again, as in question #2, participants felt in order to obtain a measure of approval within their respective industry it was necessary to conceal the fact of being an affirmative action participant:

One of the problems as an 8(a) participant is you don't start off advertising the fact that you are an 8(a) company...When you tell them you are 8(a), companies assume you are there for a "free ride." Once you get the job you can then show them you have the technical merit to perform. Once we got established, I typically stayed away from jobs that were considered affirmative action. (Participant #3)

4. Are you familiar with the *Adarand* Case?

All of the participants had heard of the *Adarand* case. The Government personnel were more familiar with the case, but surprisingly all but one of the small business personnel were aware of the facts and holdings that resulted from the decision. Many of those who thought they knew what the case was about were only partially informed about

one aspect of the case, such as: "it killed Rule of Two" (Participant #3) or "it did away with affirmative action" (Participant #10). The owner of one company, whose responses were not used, had not even heard of the case.

In the interest of conserving the participants' time, the researcher provided a brief synopsis of the facts surrounding *Adarand* and the Supreme Court's holding to all participants in order to query the remaining questions from a common knowledge base. The synopsis that was provided to the research participants is available in Appendix B.

5. **The *Adarand* case was handed down June 1995. Now that nearly three years have passed, do you feel that the amount of Government contracts have increased, decreased, or no change due to the ruling?**

This question was purposely open-ended, in order to solicit responses not only about the contracts that their company received, but also the amount of contracts within their respective industries. The responses ran the entire gamut, from more work than they could actually perform to work is drying up at an alarming rate:

> **Business has decreased significantly. We have seen other 8(a) companies that [have] been in business since the mid-80s and early-90s go bankrupt. Which could very well be in relation to the number of Government dollars.** (Participant #3)
>
> **I am starting to see a definite change [for the better]. Not only in the amount of work that we are getting, but also in the attitudes of the Government reps since *Adarand*.** (Participant #10)
>
> **The statistics I've seen show that there are less disadvantaged business participation which precipitated a lot of backlash, and in turn Congress cut the management of the programs. By doing so sends the message that is not a serious program, and the appearance to the public is that these programs are no longer needed.** (Participant #6)

Business has been picking up lately. I guess prior to you asking me that question I had never thought about it that much. *Adarand* is more than likely the reason for it. Jobs that we were applying for and not getting back in the early to mid 90s are starting to come to us on a more frequent basis lately. (Participant #9)

Currently, there is more work than we could ever possibly perform ourselves. (Researcher attempted to clarify response by requesting participant to respond only regarding Government contracts) **To tell you the truth, I am referring to Government contracts, at this time we have seen no effects of Government down-sizing [nor *Adarand*] on our business.** (Participant #2)

Business is going away. The Government agencies are starting to bundle smaller contracts into larger contracts that small firms are not able to compete for. Government Wide Acquisition Contracts (G-WACs) allow the contracting officers to provide Government wide services, eliminating smaller business opportunities...Racism is very sophisticated. (Participant #4)

A G-WAC is a contracting mechanism that uses an Indefinite Delivery/Indefinite Quantity type contract that is negotiated by a Government agency, but the services or material of the contract are available to all agencies (GSA 1998). This same participant praised the Clinton administration's leadership in the wake of *Adarand*:

I think the defense mechanisms have had to be fortified in protecting set-asides. Agencies as a whole have had to state why they adhere to or not adhere to the set-aside. An example is the changes to the SBA programs that President Clinton ordered saved the [8(a)] program, whereas it could have easily been dismantled had he not done so. (Participant #4)

6. What impact do you feel that the *Adarand* ruling will have on the future of Government contracting?

Based upon information about the case and their personal observations regarding trends within their respective industries, participants were queried to determine what they

felt the future would hold. The responses were varied. Some responded that there would not be much change at all, whereas others felt that we have only seen the tip of the iceberg, i.e., more changes to come:

> **I really can't say what the future will hold for Government contracting, but if the changes that I have experienced are due to *Adarand* I am all for them.** (Participant #9)
>
> **We have not felt the impact of the ruling, if there are any yet, due to the condition of the economy. 1997 and 1998 have been the best in 16 years.** (Participant #2)
>
> **I don't think that [Federal contracting with minorities and women] is ever going to go back to where it was [prior to *Adarand*]. I think that it will stay where it is. I think there is still a need for [affirmative action] because at the state and local level there is always the problem where the politicians are somewhat friendly towards the businessmen [within their jurisdiction]. [Which is] not so at the National level.** (Participant #7)
>
> **I don't think that [*Adarand*] will affect [Government contracting] that much at all...I have to also say that we don't really know at this point. [*Adarand*] has changed definitional boundaries. Here in California it has had a major impact. [*Croson*], *Adarand*, and CCRI have created an aura of reverse discrimination.** (Participant #5)
>
> **I think that [the effect of *Adarand*] is already taking place in the guise of "contract bundling." Contracts in the [hundreds of] millions of dollars and the people benefiting are the large *Fortune 500* companies who already have a large share of the pie...Big contracts will reduce the opportunities of smaller companies.** (Participant #4)

Recall from Chapter VI that one of the changes to the SBA's 8(a) program was that it relaxed some of the alliance guidelines in order for smaller companies to position themselves to compete for larger contracts.

This participant, among others, goes on to provide an opinion of what the future will hold for the 8(a) program in response to the less restrictive disadvantaged requirements to enter the program:

> **8(a) will not survive through 2005. It will be rendered ineffective due to allowing non-minority firms to enter, which is ironic because it was for this very reason that the program was allowed to continue.** (Participant #4)
>
> **The biggest effect [of *Adarand*] is that the 8(a) program of today is not the same as ten years ago, or even one year ago.** (Participant #3)
>
> **Every company is going to apply for 8(a) [participation] under the premise of being economically disadvantaged.** (Participant #1)
>
> **I think when more cases [challenging affirmative action] surface, there will be even more changes. I really like the direction that the 8(a) program is headed, but a lot more needs to be done.** (Participant #10)

E. ANALYSIS OF INTERVIEWS

The information provided by the participants in the research interviews offered very revealing evidence of the results of the *Adarand* case. There was a distinct racial pattern of responses as to how interviewees view *Adarand* and future changes in Government contracting. When commenting on the future with *Adarand*, participants' responses were filled with indications of "self-interest," the belief that people are resistant to changes that they feel will hurt them and support changes that will enhance their position (Cox and Beale 1997). Conversations centered on themes such as "losing previous progress" and "smaller share of Government contracts" for minorities. Non-minorities were more positive than minorities in their responses about the effects of the

ruling and their prospects for the future, often giving the impression that they anticipate more changes similar to *Adarand* will follow. Several issues that were raised by the responses of the participants offer suggestions that may reveal why the effects are not more prevalent at this time. Those issues are: (1) too soon to tell; (2) the economic paradox; (3) awaiting further adjudication.

1. Time Will Tell

The basic fact is that it is still too early to determine the long-range effect that *Adarand* will have on Federal contracting. Federal agencies are challenged every day to ensure that their programs remain in compliance with *Adarand*. Some of the participants responded that they were seeing the effects of *Adarand*, while others reported that they have seen very little, to no change at all. The pendulum of change could swing more toward the conservative direction of reducing affirmative action even more, or it could stay to the left as participant #6 suggests:

> **I think [the *Adarand* ruling's impact] is going to turn around, because it does not make any sense. When you have a segment of the population and they get five percent of the contracts and [because of *Adarand*] they start to get one percent of the business again, this country will realize that we have to make some adjustments. We are starting to see some of [the shifts away from *Adarand*] now.**

2. Paradox of the Present Economic Environment

Two factors that are taken into consideration in evaluating the current economic environment represent contrasting influences: a flourishing economy and reduced Government resources due to downsizing. In light of the previous analysis that it is too

early to determine the effects of *Adarand*, the paradox occurs when the forces of a booming economy should dictate a rise in business opportunities, and downsizing should reflect fewer opportunities. Responses from the participants support the notion of this paradox, as they were split in their responses to Question #5.

However, in the macro perspective data supports that the trend is Government contracting business for minority firms has increased in the Post-*Adarand* period (Stout and Rodriguez 1997). The Government's data goes further to support these findings as reflected in Figure 1 for FYs 1993-1997. Although the number of 8(a) firms shows growth throughout the period, note that in FY 97 (a year beyond the Stout and Rodriguez study), the number of 8(a) dollars starts to decline. This decline may indicate that *Adarand* is starting to have an adverse effect on minority contracting opportunities or some other economic environmental factor (Government downsizing, etc.) has stimulated a shift in contracting dollars.

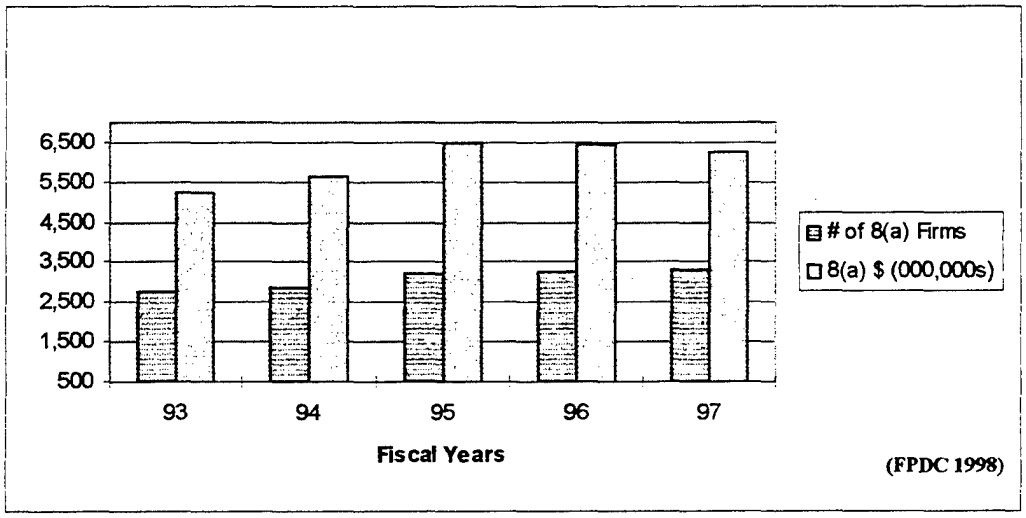

Figure 1. Minority Contracting Statistics

3. "The Jury is Still Out"

Following the Supreme Court's *Adarand* ruling, many observers of the Court reflected that the ruling created more questions than answers and the true impact of the ruling will be determined in further decisions (VanMiddlesworth 1995). The consensus among the participants is we have experienced the first wave of changes that have been produced by *Adarand*. Given that consensus, many of the participants were divided in their views of which direction further court challenges to affirmative action would lead the system. Answers to questions that were left by the Court are the issues that subsequent challenges will provide, i.e., is strict scrutiny not necessarily fatal in fact and what constitutes a compelling Governmental interest in applying preferences?

F. CHAPTER SUMMARY

This chapter used a small sample of interviews to explore what impact the *Adarand* ruling was having on small and minority businesses in Federal contracting. The sample is too small to provide any conclusive opinions about the direction as to where the changes provided by *Adarand* were driving the system. However, the responses were meaningful in providing insight into the ethnocentric defense mechanisms that arise when the topic of affirmative action is involved: (i) continued discrimination; (ii) the perception that affirmative action recipients are "free-riders;" and (iii) everyone (minority and non-minority contractors) wants a bigger piece of the Federal contracting pie.

The *Adarand* case and its subsequent changes produced a tremendous amount of emotion and debate that often split down racial lines. Although the *Adarand* decision is applauded by opponents of affirmative action and scorned by minorities, it has generated dialogue that was badly needed among the key stakeholders: contractors (minority and non-minority), Government contracting personnel, Government policymakers (legislative, executive, and judicial), and taxpayers. Elements of this dialogue include lawsuits, awareness training, talk-shows (television and radio), editorials, public debate, and academic courses to bring the issue of affirmative action into the national forefront for action. Mahatma Gandhi once said, "[t]he ally you must always seek is the part of your opponent that knows what is right," (Shuford 1996). Dialogue may not resolve the differences held on affirmative action, however it provokes a discourse to probe why each individual holds those beliefs and possesses the potential for finding common ground on the issues of social justice and equity for all participants.

VIII. CONCLUSIONS AND RECOMMENDATIONS

A. INTRODUCTION

The purpose of this research was to determine what impact the landmark Supreme Court case *Adarand Constructors v. Peña* has had on Federal contracting. The goal was to explore the history of socioeconomic policy in its application through Federal contracting in conjunction with the socio-political environment of the U.S. that existed prior to the *Adarand* case; identify changes brought about by *Adarand* from the Supreme Court's ruling; and examine how those events and ensuing changes will affect the Federal contracting process.

B. CONCLUSIONS

1. Small Business Development is Essential for U.S. Economic Stability

Small business development and affirmative action have played vital roles in the effort to make the U.S. the economic and social force it is in the world today. Small business provides a dependable source for the private and public sectors to turn to for innovation and a pool of unlimited potential.

2. Affirmative Action is Still Needed

The diversity within our human resource base is a potential source of great strength. To achieve our maximum potential, the U.S. must efficiently and effectively tap into all available resources. Affirmative action created a vehicle for individuals who had

the ability but lacked the opportunity to contribute and subsequently share in the rewards of economic development. As one interview participant so appropriately put it, affirmative action created a bridge.

Unfortunately, as the DoJ research indicates, affirmative action of some form is still needed today to eradicate the effects of past and continuing discrimination. Governments—local, state, and Federal—are the primary institutions to establish and enforce affirmative action through various forms of legislation and socioeconomic policy. At the Federal level, legislation like the Small Business Act of 1953 and the Civil Rights Act of 1964 in alliance with programs such as the SBA's 8(a) for business development and DoD's Rule of Two for establishing contract set-asides, worked hand-in-hand to attain socioeconomic goals and execute change. Affirmative action programs need to be adjusted to reflect the goals needed today to accommodate a diverse society that is being infused into the workforce and business.

3. The Courts have had Difficulty Interpreting Affirmative Action in the Application of Socioeconomic Policy

When the execution of the law conflicts with the interpretation of the law in regards to the Constitution, the incongruity is settled via adjudication. The judicial system for the U.S. has the task of defining an appropriate test for the use of affirmative action in the execution of socioeconomic policy in its relationship to Constitutional rights. The conflict in question in this research was interpreting whether affirmative action violated the Fifth (Due Process Clause) and Fourteenth (Equal Protection Clause) Amendments'

Constitutional rights of non-recipients. The most notable cases that required interpretation by the Supreme Court preceding *Adarand* were *Bakke, Fullilove, Croson,* and *Metro. Bakke* held that race could be used as one of the criterion of a university's admission policy, as long as it was not the only criteria. *Fullilove* decided that Congress had the authority to impose economic regulations on private contractors receiving public funds. The standard of strict scrutiny was mandated to state and local governments in applying race and gender-based preferences in the application of affirmative action programs in the *Croson* decision. The strict scrutiny test established that the Government had a compelling interest to remove the effects of discrimination, but only in cases where the application is narrowly tailored to the specific case. *Metro*, on the other hand, sustained that the Federal Government was only required to adhere to the standard of intermediate scrutiny in the use of affirmative action.

4. Circumstances Beyond the Realm of the Facts in *Adarand* Influenced the Justices' Decision

Although in theory "justice is blind" and Supreme Court justices are obligated—compelled—to adhere only to the facts and jurisprudence when reviewing a case, several factors external to the facts of the case at hand influenced the Court in rendering its *Adarand* decision. Those factors examined in this study were the political balance of the members of the Court and three related but disparate initiatives with affirmative action implications: the Glass Ceiling Commission, the California Civil Rights Initiative (CCRI), and the Equal Opportunity Act (EOA) of 1995. The effects of a President's appointments

to the bench far exceeds that of his administrative term. In *Adarand*, the appointments of previous Republican Presidents, George Bush, Ronald Reagan, and even Richard Nixon were still imprinting their philosophies on the judicial landscape—a span of nearly 25 years. The Glass Ceiling Commission identified the disparity that existed in the workforce of salaries and management positions between women and minorities and that of white males. CCRI, although a California referendum, ignited a nation-wide debate on banning race and gender-based preferences in education, employment, and contracting. The EOA of 1995 was Senator Robert Dole's and Representative Charles Canady's attempt to Federalize CCRI. Although it is not certain that any of these factors influenced the holding of any of the Supreme Court Justices, the ideological and humanistic aspects of their decision is introduced to entertain further points of discussion.

5. The *Adarand* Holding Significantly Changes the Use of Affirmative Action in Federal Programs

As the holdings indicate in the previous cases argued before the Court, there is a fine line that must be straddled amid serving a compelling Government interest and violating another's Constitutional rights while doing so. For all intent and purpose, *Adarand* served two functions: it overturned the *Metro* ruling of applying intermediate scrutiny and it Federalized the *Croson* ruling. In overturning *Metro*, the Court held that *Metro* was an aberration in jurisprudence, i.e., the ruling deviated from the trajectory that previous precedents had been adjudicated. Justice Sandra Day O'Connor offered a slim ray of hope to affirmative action proponents when she noted that the strict scrutiny

standard of narrowly tailoring the use of affirmative action to serve a compelling Government interest did not have to be fatal as it had been perceived to be in the past, to the vitality of affirmative action. That is, the statement suggests that if affirmative action was applied in a manner consistent with the Court's ruling, it would survive.

6. The Clinton Administration is Committed to Making Affirmative Action Work in Compliance with *Adarand*

Following the *Adarand* decision, a flurry of activity occurred within the agencies of the Federal Government to review and adjust accordingly all programs that used race and gender as the basis for utilization. President William Clinton re-emphasized his administration's commitment toward maintaining affirmative action, but only in a manner that complied with *Adarand.* While programs such as the SBA's 8(a) were adjusted to conform with the strict scrutiny standard, DoJ implied that it could not justify narrow tailoring the use of DoD's Rule of Two to serve a compelling Government interest.

C. RECOMMENDATIONS

1. Retain Affirmative Action Programs

Affirmative action programs are still required in every aspect of society. The data provided in the study underscores the validity of the need for affirmative action to continue in America. Evidence of discrimination still exists as reflected in the DoJ study and the interview responses. The researcher feels that the procedures the President established to review current programs for compliance are sufficient in immediate response to the Supreme Court's ruling. However, to ensure that these programs (as well

as others to follow) will survive over time the researcher recommends periodic reviews (for existing programs) and the incorporation of *Adarand* compliance reviews into the planning process for subsequent programs.

2. Conduct a Nationwide Disparity Study

A National disparity study should be conducted to assess the damaging effects that discrimination imposes on the entire nation. By assessing this damage, governments (Federal, state, and local) will establish the legal grounds to validate the use of affirmative action programs to serve the compelling interest prong of strict scrutiny, i.e., to eliminate discrimination. To economize, the National disparity study should begin by incorporating the data of previous studies collected by DoJ. That data should augment the findings of subsequent disparity studies from areas that had not been previously studied to represent a collective study of disparate economic conditions of the entire country. Once assembled, the data should: (i) determine National disparity in relation to the attainment of Federal socioeconomic goals, and (ii) be apportioned by region for application in state and local affirmative action programs.

D. RESEARCH QUESTIONS

1. Primary

What is the effect of the Supreme Court's *Adarand* ruling on Federal contracting?

As the interview responses indicated, the *Adarand* case has indeed had an impact on contracting within the Federal Government, but further analysis finds that the responses

are divided down racial lines in determining the effect of the changes . Factors such as the state of the economy and Government downsizing contribute to make it even more difficult to distinguish what actually caused the results.

The minority and Government participants responded that affirmative action is still needed. DoJ evidence reflects that affirmative action is needed. The majority of the American public, through public opinion polls, says that we need affirmative action. These programs and policies are needed, and should be applied using the following guidelines: (i) only in situations where an actual disparity exists due to discrimination; (ii) when it can be administered and monitored effectively and efficiently; and (iii) in a manner that will produce measurable results. Most importantly, politicians must better explain the need of affirmative action and educate the public and industry about the reasons it is needed (eradicate discrimination by promoting opportunity).

One of the best things resulting from *Adarand* is that the ruling prompted the President to order a Governmentwide examination of all programs using affirmative action. This examination would assist in determining whether affirmative action programs have been operating in the manner in which they had been designed.

An effect of *Adarand* in the short-run may be that it is generating dialogue between the proponents, opponents, policymakers, and taxpayers. A dialogue that has been long overdue. In a strictly legal sense, some applications of affirmative action in the pre-*Adarand* environment may have been unconstitutional. Implementing socioeconomic policy to counteract the effects of discrimination is not an exact science. A diverse

population requires—demands—that the playing field become level to remove past and present effects of discrimination. The deeply rooted philosophy of racial and gender bigotry make it necessary to eliminate discrimination to provide opportunity for women and minorities. It is most important that the opportunities created must have a lasting and beneficial effect both to those that are targeted and the socioeconomic environment. The dialogue created by *Adarand* has the potential for resolving issues of social justice and equity for all participants.

2. Subsidiary

a. What are the socioeconomic goals of the Federal Government?

Socioeconomic goals were introduced in legislation that was enacted in the 1950s (Small Business Act of 1953 and Small Business Investment Act of 1958) and 1960s (Civil Rights Act of 1964). Times changed and so too did the targets that those programs were identified to assist; unfortunately, the programs were not adjusted to reflect those changes. Year after year subsequent programs layered additional goals on top of the previously existing initiatives. The problems with these programs and their related goals were eventually disclosed when Senator Dole requested the CRS data in researching Federal affirmative action programs prior to introducing the EOA of 1995. With goals ranging from five to 25 percent, no one could rationalize that reform of some type was not necessary. *Adarand* incorporated into the Federal contracting system the

necessity to review the entire system and a revision of the standard upon which goals would be reviewed.

b. What are the methods that the Federal Government can use to attain those goals?

The primary tools that the Federal Government used in order to implement the goals of socioeconomic policy were through the use of timetables, targets, and most commonly—set-asides. The ruling did not proclaim the use of such programs unconstitutional, but provided an opportunity for agencies to adjust these programs to withstand the strict scrutiny standard. Programs such as the SBA's 8(a) and DoD's Rule of Two were developed to attain the goals that policymakers visualized to allow women and minority firms to permeate industries that had previously been out of their reach. The programs succeeded in achieving their intended purposes, but through poor administration and the lack of maintenance over time they became vulnerable to attacks from both participants and opponents.

President Clinton's mandatory review of all programs that relied upon affirmative action, in response to the *Adarand* ruling looked at more than 160 programs including 8(a) and Rule of Two were examined for compliance. The Justice Department led this review to ensure that all pertinent programs and policies conformed. Most programs like 8(a) required some adjustments to conform to the strict standard of scrutiny, but DoD's Rule of Two had to be suspended and eventually subjected to such a level of control that when it is applied it is basically moot. *Adarand* provided an

opportunity for DoD to replace a weak procedure (Rule of Two) with initiatives that were designed with the strict scrutiny standard in mind. In doing so, DoD was able to introduce new initiatives that were not only sustainable, but that will continue to implement socioeconomic policy into the future.

E. SUGGESTIONS FOR FURTHER RESEARCH

1. Full Scale Study on the Impact of *Adarand* on Federal Contracting

A full scale study should be performed to examine further the effect of the *Adarand* ruling on the Federal contracting process. This study should seek to determine: (i) if ensuing court cases have challenged the strict scrutiny standard; (ii) follow-on results of subsequent program adjustments or suspensions based on DoJ review recommendations; and (iii) the substantiation of legislation to eliminate or modify the use of affirmative action through Government programs, such as resurrection of the Dole-Canady EOA of 1995.

2. A Cost/Benefit Study of Government Set-Asides

An in-depth empirical study of the benefits and costs of using set-asides in Federal contracting should be conducted. What are the changes in overall costs of procurement, incentives, and administration from using set-asides? What are the nature and extent of the benefits attained through the implementation of set-aside programs?

3. A Study to Determine the Impact of the SBA's 8(a) Program in Response to *Adarand*

An in-depth analysis of the SBA's changes to the 8(a) Program instituted to strengthen it in defense of the strict scrutiny standard brought about by the *Adarand* case should be conducted. The effect of the changes on pertinent stakeholders should be determined, e.g., women and minority firms, non-minority Small Businesses, and Government agency results.

4. Study the Effect of Contract Bundling for Federal Contracts on SDBs

A study to examine the impact of the practice of bundling Federal contracts before the SBA changed the affiliation rules for the 8(a) program and after the rule change should be conducted.

5. Examine the Relationship between Socioeconomic Goals and the Government Performance and Results Act of 1993 Compliance

A study to determine if the introduction of the Government Performance and Results Act (GPRA) of 1993 has shifted Government agencies' philosophy to implement socioeconomic policy should be undertaken. GPRA requires agencies to tie goals into measurable results. Justification of affirmative action programs may complicate this process. The study should be conducted to determine what effect, if any, GPRA has on the achievement of socioeconomic goals through affirmative action.

APPENDIX A. ABBREVIATIONS AND ACRONYMS

AGC	Associated General Contractors of America
BLS	Bureau of Labor and Statistics
CADAP	Californians Against Discrimination and Preferences
CCRI	California Civil Rights Initiative
CEO	Chief Executive Officer
C.F.R.	Code of Federal Regulations
CRS	Congressional Research Service
DoC	Department of Commerce
DoD	Department of Defense
DoJ	Department of Justice
DoT	Department of Transportation
EOA	Equal Opportunity Act of 1995
FAR	Federal Acquisition Regulation
FCC	Federal Communications Commission
FEMA	Federal Emergency Management Agency
FISC	Fleet and Industrial Supply Center
FPDC	Federal Procurement Data Center
FY	Fiscal Year
GPRA	Government Performance and Results Act of 1993
GSA	General Services Administration
G-WAC	Governmentwide Acquisition Contract
H.R.	House of Representatives
LWVC	League of Women Voters, California
MBE	Minority Business Enterprise
MED	Minority Enterprise Development
MGC	Mountain Gravel & Constructors
MSLF	Mountain States Legal Foundation
NAACP	National Association for the Advancement of Colored People
NCMB	National Coalition of Minority Businesses
NOW	National Organization of Women
OASD	Office of The Assistant Secretary of Defense

OFCCP	Office of Federal Contract Compliance Programs
OFPP	Office of Federal Procurement Policy
P.L.	Public Law
S.	Senate
SBA	Small Business Administration
SDB	Small Disadvantaged Business
STURAA	Surface Transportation and Uniform Relocation Assistance Act
UCD	University of California, Davis
U.S.C.	United States Code
WBE	Women-owned Business Enterprises

APPENDIX B. *ADARAND* SYNOPSIS

In 1989, Adarand Constructors, Inc. offered the lowest bid to subcontract guardrails for the prime contractor of a Department of Transportation highway construction project in Colorado. The prime contract offered monetary incentives for the prime contractor to subcontract with minorities. Adarand was not awarded the contract which instead went to Gonzales Company, whose owners were minority and presumed to be socially disadvantaged. Adarand sued the Government on the grounds that its affirmative action policy violated the firm's constitutional rights of equal protection and due process. The case went through the judicial process and was reviewed before the U.S. Supreme Court in 1995.

The Court held that future applications of affirmative action to Federal programs will apply the standard of strict scrutiny, instead of the previous standard of intermediate scrutiny. Strict scrutiny requires that the use of any race and gender based programs be narrowly tailored to serve a compelling Government interest, which in most cases requires the proof of discrimination.

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